IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 189
ARC 27/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	H Plaintiff
AND	A Ltd Defendant

Hearing: 13, 14 and 15 August 2014
(heard at Auckland)

Appearances: R Harrison QC and C Abaffy, counsel for the plaintiff
P Caisley, counsel for the defendant

Judgment: 7 October 2014

JUDGMENT OF JUDGE B A CORKILL

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Introduction

[1] Mr H challenges a determination of Employment Relations Authority (the Authority) that he was justifiably dismissed from his employment as a pilot by A Ltd on 26 September 2013. The dismissal occurred following an investigation into a complaint by a flight attendant that Mr H had sexually harassed her during a lay-over on a tour of duty from New Zealand to a Pacific destination. The Authority held that the decision to dismiss on the ground of serious misconduct was procedurally and substantively justified.[1]

Factual summary

[2] Prior to the events relating to the complaint, Mr H was employed by A Ltd as a pilot for over eight and a half years, having previously worked for other entities as a pilot or flight instructor.

[3] On 17-19 August 2013, Mr H was rostered on a tour of duty (ToD) to a Pacific destination with Captain B, Flight Attendants Ms A, Ms B, and Ms C, and In-flight Services Manager (ISM) Ms D. This was Mr H's third trip to that destination. The events which are the subject of the challenge relate to what occurred during a two-night layover prior to the return trip to New Zealand.

[4] After the completion of the ToD, Ms C raised concerns as to what had occurred. The subsequent investigation conducted by Fleet Manager Pearce resulted in statements being taken from all involved, with disparate accounts on some issues. It will be necessary to examine the key conflicts of evidence later in this decision. The following is a broad summary of the main events.

[5] Ms C joined A Ltd in July 2013. She was aged 19, and the ToD to the Pacific destination was her first over-night layover duty.

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[1] *H v A Ltd* [2014] NZERA Auckland 131 [Substantive Authority determination]. On 13 December 2013, the Authority made an interim non-publication order in respect of the names and identifying details of the parties, indicating that this would lapse on 20 January 2014: *A v B Ltd* [2013] NZERA Auckland 575. The interim Authority determination was the subject of a challenge heard by a full Court, in which the majority ruled that until further order of the Court there would be an order prohibiting publication, in respect of the substantive determination, prohibiting publication of the parties' names and other identifying particulars: *H v A Ltd* [2014] NZEmpC 92 [Interim non-publication judgment].

[6] Following arrival at the destination, Mr H and the four cabin crew took a rental van to a local liquor store and supermarket where various purchases were made. At the liquor store Ms C wished to purchase a bottle of red wine, and asked Mr H for a recommendation. He suggested one or two options.

[7] All crew were staying at a hotel; their accommodation units were adjacent to each other. Each unit opened onto a small veranda, and then a swimming pool and surrounding area where reclining chairs were positioned.

[8] On returning to the hotel, crew members were seated together outside their accommodation units engaging in small talk over drinks. Mr H offered Ms C a sip of his glass of the red wine he had purchased. He said this was in the context of a continuation of the conversation at the liquor store.

[9] At approximately 6.30 pm that evening, all crew attended dinner at a local restaurant. They were seated at a small table; Mr H was adjacent to Ms C. The occasion was convivial. Ms C subsequently stated that at one stage Mr H "briefly almost stroked my leg and I went sorry as I thought I was in his way and thought he wanted to get out and wanted me to move my chair. We carried on talking and I thought 'oh, it must have been an accident' but I got this weird feeling inside." Subsequently, Mr H stated he was unaware if he had touched Ms C's leg, but conceded that since six adults were seated at a small table, this may have occurred accidentally.

[10] After the meal, all crew returned to the hotel; the flight attendants arranged to watch a DVD in the ISM's room. Mr H asked if he could join them and Ms B agreed. There were two chairs in the room on which flight attendants were seated. One of them vacated her chair to enable Mr H to sit on it, rather than on the bed of the unit. Ms C was seated on the bed; she later stated that she thought it was odd for a 50 year-old man to watch "chick flicks" with young female colleagues.

[11] On the morning of the second day, 18 August 2013, three of the flight attendants went for a walk. One of them asked Mr H if he wished to join them – he declined.

[12] While they were away and after Mr H had visited a local market he discussed dinner plans for the group with Mr B. Mr H then went to ISM D's room, knocked, and spoke to her from the doorway about dinner options.

[13] Later the three flight attendants returned. Beside the pool, Mr H inquired about their walk. In the course of conversation, Ms C told Mr H that she was tempted to go for a swim in the pool later in the day. She said that he responded by stating "that will be something to look forward to"; she subsequently said that she thought this comment indicated sexual intent. Mr H subsequently stated that his comment had been taken out of context, because he responded to what he thought was a joke made by her when she said "if you hear a scream, that's me". He did not think she was being serious. This incident was not referred to in Ms C's subsequent complaint, although it was mentioned later.

[14] The flight attendants returned to the hotel between 3.00 and 3.30 pm. Ms C then sat by the pool. Mr H also sat on one of the loungers with a puzzle book. The other flight attendants came out to join them, and as there were insufficient loungers with cushions for all, Mr H gave up his and sat on a barbeque table.

[15] Ms C stated that she was going to her room as she wanted to get out of the sun; subsequently she said she did so because she felt uncomfortable as she believed Mr H was watching her. Mr H was present when she went to her room.

[16] In her room, she commenced watching a movie, sitting on her bed over its sheets, with a blanket over her. When she entered, she had left the door of her room open.

[17] Meanwhile, Mr B returned to the hotel. Following a brief conversation he and Mr H went to a nearby location for sight-seeing purposes.

[18] On returning, and when taking his camera to his room, Mr H said he noticed that Ms C was not at the pool with the other three flight attendants. He stated that he then went to Ms C's room to check that she was "okay".

[19] Mr H subsequently stated that he knocked at the door. He asked whether it was "okay to come in", to which Ms C replied "yes" or "yeah". He then stepped into

the room and asked her whether she was "okay" or "all right". For her part Ms C later stated that she could not remember exactly what words passed, but she had not invited Mr H to come into the room. Mr H stood by the bed, focussed on the television screen. There was a brief discussion as to what movie Ms C was watching. Ms C stated that Mr H said he had seen the movie previously, but that after approximately a minute, he nudged her twice on the shoulder indicating he wanted to get onto the bed. Mr H agreed that this happened, stating that he did so out of habit and/or subconsciously, as he did in his own home with his teenage sons when he wanted them to create room on a couch for him to sit down and watch television. It was neither a conscious thought nor a conscious action.

[20] Ms C and Mr H diverge in their recollections as to what happened next. Ms C stated that she moved to the other side of the bed, leaving the blanket where she had been sitting. She stated that Mr H sat on the bed and got under the blanket covering himself from the waist down. She said that after a short period of time, Mr H lifted the blanket and communicated "come on" indicating he wanted Ms C to come under the blanket with him. She was alarmed. She said that when positioned on the far side of the bed "her arms hugged her knees". She says that at one stage Mr H reached across and touched her in a sexual way. She says that she stated "don't even try", and continued to be alarmed.

[21] For his part, Mr H says he initially sat on the blanket, so he then removed it and handed it to Ms C so she could put it around her if she wanted to. She said "no thanks", and that she "was getting hot anyway". He also said that while positioning himself on the bed he accidently brushed the outside of Ms C's leg "with my index finger, little finger and a slight part of the outside of my palm". He immediately moved his hand away and adjusted his position. He recalled that Ms C reacted by moving away but he thought this was simply to give him more room on the bed. He recalled her mumbling something some 10 to 15 seconds after he had touched her, and that he responded "pardon me, I'm sorry, I didn't hear what you said". She replied "it doesn't matter" and said "that guy is gay" referring to one of the movie characters. He asked her which one and she identified the individual.

[22] Ms C stated that there was an awkward silence for 30 to 40 seconds, after which Mr H stated he was going to obtain a glass of water leaving the room. Mr H

recalled that as he left the room he offered Ms C a drink of water; she declined. He then left the room to do so; since his wife was attempting to contact him, he conducted a conversation in his room with her by Skype.

[23] Immediately after this incident Ms C joined the three other flight attendants at the poolside. She was upset and found it difficult to converse. Later that afternoon, prior to the entire crew meeting up for dinner, Ms C joined other flight attendants, and asked them whether they thought Mr H was "weird". They agreed he was which encouraged Ms C to tell them what had occurred.

[24] Ms C was quiet during the dinner (contrary to her engagement with others at dinner on the previous night); she described the occasion as "very awkward". By this stage, she was being strongly supported by the other flight attendants, who ensured that she did not sit adjacent to Mr H at the dinner table. Mr H recalled that he was unaware of any awkwardness. He recalled Mr B talking about his family. Later, one of the flight attendants slept in Ms C's room so as to provide her with moral support.

[25] The next morning an opportunity arose for Ms C to describe to Mr B (in the presence of the other flight attendants) what had occurred the previous day. She said she would be filing a complaint. Mr B regarded the matter as serious. After discussion with all the flight attendants, it was agreed that the return trip to New Zealand would proceed as planned, and that the complaint would be progressed following their return to New Zealand. Ms C was offered the option of being stood down, but she said she would rather remain on duty. It was agreed that she would operate from the rear of the aircraft cabin, so that she did not have to visit the flight deck.

[26] The next day, Mr B contacted Mr H and told him of the complaint which Ms C would be making to A Ltd. He said that it was completely inappropriate to enter one of the flight attendant's rooms. Mr B said that Mr H agreed he had made a mistake entering Ms C's room, but said it was only "light-hearted fun with no other intentions". Later he said that Mr H also acknowledged that he had touched Ms C, but that it was "just a light slap". Mr H agreed that this conversation occurred, but

not that he used the term "light-hearted fun" or that he acknowledged slapping Ms C. He said that he reinforced to Mr B that he had no "intent" when going into the room.

[27] Mr H sought advice from a representative of the New Zealand Air Line Pilots' Association (NZALPA), who was neither a lawyer nor legally qualified. Mr H was advised to call Mr B and ask for Ms C's number so he could apologise to her. He accordingly rang Mr B to request the number. Mr B stated that "it was too late for that" and that he should obtain a lawyer. He confirmed that a sexual harassment claim had been lodged.

Investigation process

[28] On 20 August 2013, Mr B advised the Deputy Fleet Manager by phone that an incident had occurred. The Deputy Fleet Manager recorded Mr B's notification in an email to the Fleet Manager, Mr H Pearce. On the same day, Ms C provided a written statement by way of complaint.

[29] Mr Pearce considered this information on 21 August 2013 and decided it was appropriate to investigate matters further. He considered it was important to capture as much information as possible from the crew and set about interviewing them. On the same day, aware that a complaint was being lodged, Mr H prepared a summary of the events which he submitted to management later in the process.

[30] Mr Pearce met first with Ms H on 23 August 2013. Ms R Chapman, a Human Resources Consultant, also attended and took a note of the questions asked and answers given. The same process was adopted with regards to all witnesses other than Mr H as will be explained more fully below.

[31] On the same day, Mr Pearce interviewed Ms A, and on 26 August 2013, he interviewed ISM D and Ms B. He also spoke by telephone to Mr B who by this time had provided a document which he had described as a "full report" on the incident.

[32] Mr Pearce decided that the issues were of sufficient seriousness as to warrant a formal interview with Mr H. Consequently a letter was sent to him on 27 August 2013 advising of a meeting to be held shortly thereafter. That letter

attached a copy of the complaint received from Ms C, and statements and/or notes of interviews obtained from the other members of the crew. The letter went on to state:

> From the information received it appears that your conduct and behaviour was inappropriate and found to be unwelcome and offensive by [Ms C]. Specifically, it is reported that:
>
> 1. On 17 August, during a crew dinner you touched [Ms C's] leg.
> 2. On 18 August, while standing outside the hotel rooms close to the pool after lunch, [Ms C] commented to you that she may go for a swim later in the day to which you responded with words to the effect "that'll be something to look forward to".
> 3. On 18 August, around 3.30 pm, you entered [Ms C's] room without invitation, walked to the bed, touched [Ms C] on the shoulder twice and said "move over". [Ms C] moved to the other side of the bed and you got onto the bed and under the blanket. Shortly thereafter you touched the inside of [Ms C's] upper leg, lifted the blanket and said "come on" and immediately touched the inside of her upper leg for a second time.
> 4. [Ms C] advises me that your entry into her room and events in the room were uninvited by her and that when you touched her leg she said to you "don't even try". [Ms C] stated that at the time, "I was pretty much freaking out inside".
>
> From the information provided, the company is concerned that your apparent actions were uninvited, unwelcome, and offensive and, if substantiated may:
>
> 1. Constitute sexual harassment as per the [A Ltd] Harassment Policy; and/or
> 2. Amount to a breach of the company Code of Conduct "to act ethically at all times with integrity, mutual trust, respect for others and in accordance with the law", and/or
> 3. Amount to inappropriate behaviour while on a tour of duty and fall below the behavioural expectations of a pilot while on a tour of duty.

[33] Mr H was then advised that the company wished to meet him to consider whether he should be stood down on pay from flying duties whilst an investigation was undertaken. Copies of company documentation relating to relevant obligations were attached.

[34] On 29 August 2013, the parties met to discuss the possibility of a stand-down. Mr H stated that he did not believe this needed to happen, because he could distinguish between his personal life and his professional life. However, Mr Pearce determined that it was appropriate for Mr H to be stood down. This decision was not contested in the challenge.

[35] A further meeting was held with Mr H and his union advisor, Mr A Nicholson, on 5 September 2013. Mr Pearce attended, together with Ms Chapman and Mr G Norton (Senior Legal Counsel).

[36] Mr H produced the written statement which he had previously prepared, and copies of the witness statements taken by Mr Pearce annotated with his responses. The format of the interview was that Mr Pearce asked him to explain in detail his recollection of the events that occurred during the lay-over.

[37] The interview was structured to deal with those events in a chronological sequence. In the course of the interview Mr Pearce asked Mr H to comment on the assertions made by Ms C.

[38] Mr Nicholson then spoke to the documents which Mr H had tabled. The point was made that Mr H had been entirely consistent in his account; that the account of others were problematic because the crew had clearly discussed matters; and that their recollections were coloured by hindsight. Mr Nicholson also emphasised that on previous trips to this destination, there was a fair amount of interaction between crew members.

[39] With regard to the four points raised in the letter sent to Mr H by the company, Mr H stated:

a) At the crew dinner on 17 August, Mr H had sat down first at the table so that he had a good view of a television screen; nothing untoward had happened. The table was very small with six adults crammed around it, and he had no recollection of touching Ms C. If that had happened it was definitely not deliberate.

b) With regard to the conversation where Ms C commented she may go for a swim, his statement "that will be something to look forward to" was part of a larger light-hearted conversation where he had responded to her joking statement that he would hear her scream because of the cold temperature of the pool. Her statement was not in context.

c) Mr H had gone to her room because he was concerned that she was no longer in the pool area. He said that this was based on what he would term "social familiarity". A previous example of this occurred on a ToD to this destination when a crew member had ear problems and tried to "hide herself in the room" so she could work on the return flight. On this occasion Mr H had also talked to the flight attendant in her room to ensure that she was "okay". He said that Mr H had asked to go into the room after knocking, to which Ms C replied "yes" or "yeah". After she replied that she was fine and when he was standing beside the bed watching the movie he tapped her lightly with the back of his hand out of habit. There was no conscious thought or action involved. He agreed that he had said "move over", which is when he sat on the bed.

d) Mr Nicholson stated by way of summary:

- Mr H had entered Ms C's room with permission.
- He had touched her on the shoulder twice and said "move over".
- She had not moved to the other side of the bed when he got on to it.
- He had brushed his hand against her leg accidentally; he had not touched her on the inside of her upper leg, nor lifted the blanket and said "come on", nor touched her on the inside of her upper leg for a second time.

[40] Mr Nicholson stated on behalf of Mr H that what happened was "bloody stupid" on the part of Mr H. He also submitted that Ms C was only uneasy about the incident when others told her that she needed to make a complaint; at that point she was affected by the reaction of other crew.

[41] Following the meeting, Mr Pearce decided it would be appropriate for him to speak again to Ms C and Mr B; these interviews took place by telephone on 12 September 2013.

[42] The first interview was held with Mr B. He was asked again to provide his recollection of his observations of Ms C during the ToD; and about the words used by Mr H during the two telephone conversations which took place when they returned to New Zealand. Mr B recalled that Mr H stated he was having "a bit of harmless fun", which was reiterated in the second call as "light-hearted fun" and that he had "slapped her". Later, he said that Mr H had referred to a "light-hearted slap". When asked how confident he was that these were the actual words used, he said these "were virtually the words" Mr H had used.

[43] Ms C was at her home when telephoned by Mr Pearce and Ms Chapman. Mr Pearce told the Court that he could not now recall whether he and Ms Chapman were at the same location when they spoke to Ms C. Ms C was asked to repeat her understanding as to what had happened at the crew dinner, at the pool before she entered her room, and in her room.

[44] Copies of the telephone interviews as prepared by Ms Chapman were provided to Mr H. Mr H again recorded his responses to the further accounts given by Mr B and Ms C. These were given to Mr Pearce at a second investigation meeting held on 16 September 2013, attended by the same persons who had been at the first meeting on 5 September 2013. As before, the meeting was electronically recorded.

[45] The procedure adopted by Mr Pearce at this meeting was to put a series of focused questions to Mr H, many of which involved what he considered were inconsistencies either between his account and the account of others, or as between the various accounts he had given to that point. Mr H maintained the explanations he gave at the first investigation meeting and in the various responses he had tabled to that point.

[46] In respect of this critical meeting it is Mr H's position that he was asked questions in a relentless and unfair way, and that Mr Pearce as decision-maker had already made up his mind as a result of the interviews he had held with Mr B and Ms C. For its part, A Ltd submits that all issues were fairly put to Mr H, and that he was given a proper opportunity to respond.

[47] Following the meeting, Mr Pearce prepared a comprehensive findings document. It was presented to Mr H and Mr Nicholson at a further meeting held on 26 September 2013, which was again recorded electronically.

[48] The findings document traced the history of the investigation; set out in detail the accounts given by Ms C on the one hand and Mr H on the other; and referred to the information provided by Mr B and other crew members. It was noted that there was a conflict in the information provided by the only two direct witnesses as to what happened in Ms C's room. Mr Pearce recorded that to establish what had occurred in the room, it was necessary to determine which of the two accounts was more likely to be accurate. In reaching a conclusion, contextual matters which occurred before and after the incident would be relevant. Mr Pearce then expressed the following opinions:

a) Mr H had been unable to explain why he chose to enter the room and sit on the bed, other than to say that he had been originally motivated to visit Ms C out of concern for her well-being and that entering the room and sitting on the bed was "an unconscious act". It was of concern that he could offer no "context" as to why he would think her well-being could be in question, and of further concern that this explanation had not been offered to Mr B; rather, by Mr B's account Mr H had "consistently and repeatedly" described the visit in words to the effect that it was a "bit of light-hearted fun". He concluded it was inexplicable why Mr H would enter a flight attendant's room and then position himself on the bed next to her.

b) He considered that for Mr H's version of an "accidental touch" to be credible, Ms C would have had to have moved only a small distance across the bed, so that she was still within very close proximity to him. He thought it was implausible that a flight attendant who had only met Mr H the previous day would position herself in this way.

c) He recorded that Ms C alleged Mr H reached across and, in quick succession, stroked her inner leg from approximately 10 centimetres below her knee to approximately 10 centimetres below her groin in a

manner that was, to her, clearly sexual and very deliberate; and that Mr H disputed this saying that the only touch that occurred while he positioned himself on the bed was accidental and on the outside of her leg. Given the implausible nature of Mr H's contention that a flight attendant some 30 years his junior and on her first over-night duty was comfortable having a relative stranger sit on a bed with her while alone in the room, and sufficiently close for an accidental touch to have occurred, he was unable to accept Mr H's account.

d) He considered the question of whether a touch on the inside of the leg was implausible because of Ms C's evidence that she had drawn her legs up with her arms hugging them; this counter-argument ignored Ms C's statement that she, for a period, did not have her arms hugging her legs.

e) He found that the evidence of Ms C's demeanour after the incident provided relevant context; as did Mr H's apparent focus on Ms C while purchasing wine after arriving at the Pacific destination, his sharing of wine with her from his own glass prior to dinner that night, and his comment that seeing her go for a swim would be "something to look forward to".

f) He accepted the explanation of events given by Ms C and rejected Mr H's explanation to the extent that it conflicted with Ms C's account.

g) His ultimate conclusion was:

> First officer [H's] actions towards [Ms C] were uninvited, unwelcome, and offensive and constitute:
>
> 1. Sexual harassment as per the [A Ltd] Harassment Policy, in that he sat on [Ms C's] bed, acted/spoke towards [Ms C], and touched [Ms C] twice on the inside of her leg and thigh all in a manner that was sexual in nature and,
>
> 2. A breach of the company Code of Conduct 'to act ethically at all times with integrity, mutual trust, respect for others and in accordance with the law', in that he took advantage of his rank and position within the dynamic of the crew to impose himself on a very junior and inexperienced crew member and,

> 3. Amount to inappropriate behaviour while on tour of duty that falls below the behavioural expectations of a pilot while on a tour of duty in that he conducted himself in the above manner.

[49] Having considered all the circumstances, he summarised his findings by stating that the initial allegations raised against Mr H had been substantiated, and that they amounted to serious misconduct.

[50] At the meeting of 26 September 2013, Mr Pearce presented his findings and said that he was considering terminating Mr H's employment. He invited comment on this option. After an adjournment, Mr Nicholson made extensive representations. He submitted although there was evidence of misjudgement and naivety, the company's policy indicated there were a range of outcomes in such a situation including transfer, counselling or therapy, formal warnings or dismissal. He submitted that there were considerably worse things that could happen that would justify a dismissal. It was suggested that counselling or therapy would be appropriate, and at worst, a formal warning.

[51] After considering these representations, Mr Pearce stated:

> I am mindful that we have here a trusted and experienced officer of the company with clear responsibilities and authority, entering a 19 year-old flight attendant's room for no apparent reason and sitting on her bed for no justifiable reason. And that certain actions have been found to have occurred following this. Consequently, I see no reason to depart from my findings.
>
> I have therefore found that, in the totality of the circumstances, I have lost trust and confidence in you, [Mr H] as a pilot and an employee of the company. I have considered the other options as raised by [Mr Nicholson]; however, in the circumstances I do not believe that a lesser outcome is appropriate.
>
> Given that, I advise that your employment will be terminated with effect today.

[52] This conclusion was confirmed in writing on 1 October 2013.

Issues

[53] Detailed submissions were presented by counsel for both parties, which will be specifically considered later in this decision where relevant.

[54] In summary, it was submitted for Mr H that:

a) A Ltd had failed to genuinely consider Mr H's explanations, a submission which was based on s 103A(3)(a) of the Act. The record of investigation when read as a whole demonstrated that variations and inconsistencies on what key witnesses had to say – particularly Mr H and Mr B – were not picked up on or challenged or clarified; nor, with few exceptions, was Mr H's version of events put to them for comment. There was a fundamental disparity of treatment. Further, by conducting the process of investigation in this way, Mr H was effectively required to demonstrate that his account was more credible, or at any rate more credible than Ms C's. The test in *Honda New Zealand Ltd v New Zealand Boilermakers Union* was not met in that the evidence was not convincing in respect of serious allegations.[2] A related problem was that there was predetermination on the part of the decision-maker.

b) There was a failure to genuinely consider alternatives to summary dismissal, including counselling and/or rehabilitation.

c) A Ltd failed to follow its own policies, procedures and longstanding legal obligations to ensure parity of treatment and/or avoid disparity of treatment, having regard to a previous case relating to a Mr M.

d) The established conduct was not sufficiently serious to warrant the ultimate sanction of summary dismissal.

[55] In summary, it was submitted for A Ltd that:

a) The company had sufficiently investigated the allegations made against the plaintiff, having regard to the careful process which was carried out, a submission which was based on s 103A(3)(a) of the Act. Mr Pearce was not a trained litigator conducting cross-examination, and the employer was not to be judged by the standards of a court room. The conclusions reached were those which were open to a fair and reasonable employer. The matter was sufficiently investigated.

[2] *Honda New Zealand Ltd v New Zealand Boilermakers etc Union* [1991] 1 NZLR 392 (CA).

b) Concerns were clearly raised by A Ltd with Mr H before the decision to dismiss was made.

c) A reasonable opportunity was given to Mr H to respond to the concerns. Specifically, the first meeting with Mr H was a fact-gathering meeting, with Mr H by and large being given a full opportunity to outline his account in response to open-ended questions. In the second of the meetings, Mr Pearce clearly identified major issues of concern, and put those properly and carefully to Mr H. Mr H's representative was also given a substantially uninterrupted opportunity to present points on Mr H's behalf. A proper opportunity was also given to consider the effect of the findings, and proposed outcomes, before any decision was made.

d) Having regard to the extent of the process followed, it was clear the employer had genuinely considered the employee's explanations.

e) On each of the key issues which were analysed, the findings which were made were justifiable on the basis they were open to a fair and reasonable employer.

f) After reviewing the investigative process, it was submitted that Mr Pearce did not predetermine the outcome. Following the first investigation meeting, the key issues which had been raised by Mr H were carefully put to Ms C. By the time of the second meeting, Mr Pearce had started to identify issues of importance, and had a list of particular issues which he wanted to explore in detail. That was unsurprising, and indicated a careful process.

g) The established conduct fell within the confines of the company's Harassment Policy as "sexual harassment"; furthermore the conduct warranted summary dismissal, having regard to its serious nature. A consideration of Mr Pearce's evidence to the Court confirmed that dismissal was the appropriate outcome. It was a decision which was open to a fair and reasonable employer.

h) The previous case of Mr M did not involve findings of sexual harassment nor conduct occurring inside an employee's hotel room; the case involved conduct which occurred in a public environment, and did not have the same impact on the employees concerned, as occurred in the present case. There was accordingly no disparity or, alternatively, any disparity was appropriate. Further the decision to dismiss was not undermined by disparity.

[56] Having regard to counsel's submissions, the liability issues which the Court is required to resolve are:

a) Were Mr H's explanations properly investigated and/or genuinely considered?

b) Was there disparity of treatment?

c) Other issues going to justification:

- Were alternatives to dismissal adequately considered?
- Was there predetermination?

Company documents

[57] Mr H was employed on the terms and conditions contained in the collective agreement between NZALPA and A Ltd. He was subject to the company's policies and procedures, which included Disciplinary Procedures and Guidelines and Key Policies for Employees of A Ltd.

[58] The last of these documents contained a "Harassment Policy" which defined harassment as:

> Harassment is verbal, written, visual or physical conduct in relation to … sex … and is:
>
> - Unwelcome or offensive to the recipient.
> - Of a serious nature or persistent to the extent that it has a detrimental effect on the individual's employment, job performance, opportunities or job satisfaction.

[59] It also provided a policy statement that:

> The company will not tolerate employee harassment in any form.

[60] A Ltd also had a Workplace Harassment Prevention Programme (WHPP) which in a section that described the procedure for handling a formal complaint of harassment, stated:

> In all cases where a complaint is substantiated, the alleged harasser will be disciplined in accordance with the company's disciplinary procedures. This may include transfer, counselling or therapy, formal warnings or dismissal.

[61] In addition, A Ltd had a Code of Conduct, the policy statement of which stated:

> In order to ensure the Company remains a high performing organisation, employees are expected to act ethically at all times with integrity, mutual trust, respect for others and in accordance with the law.

A standard which was required in relation to treatment of colleagues was to adhere to the harassment policy.

[62] The question of what is fair and reasonable must be assessed in the context of A Ltd's disciplinary policy. It relevantly stated:

> Managers or Team Leaders, acting as the Company's representative must:
>
> - Act fairly and reasonably in conducting any preliminary investigation or formal disciplinary investigation and in taking any subsequent action.
> - Ensure that any disciplinary action taken is consistent with principles of fairness, reasonableness and consistency.
> - When investigating allegations arrange to have a company witness present and accurate notes recorded at all preliminary investigation interviews.
> - Ensure that detailed records are kept of the formal disciplinary investigation.
> - Act in the disciplinary process within their delegated authorities.
> - Understand and properly exercise their right to discipline or dismiss an employee for misconduct or for any other act that justifies such disciplinary action and/or dismissal.

Legal principles

[63] Since Mr H was dismissed by A Ltd, the company must establish that the dismissal was justifiable in terms of the statutory test of justification as contained in s 103A of the Employment Relations Act 2000 (the Act). That section states:

> **103A Test of justification**
>
> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
>
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
>
> (3) In applying the test in subsection (2), the Authority or the court must consider—
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
>
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
>
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
>
> (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
>
> (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
>
> (a) minor; and
>
> (b) did not result in the employee being treated unfairly.

[64] The full Court considered these provisions in *Angus v Ports of Auckland Ltd*.[3] I adopt and apply the analysis set out in that decision. It stated that the role of the Court is not simply to substitute its view for that of the employer. Rather, the Court must assess on an objective basis whether the actions of the employer fell within the

[3] *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELC 94,015.

range of what a notional fair and reasonable employer could have done in all the circumstances. Relevant to this case are the following statements:

> [26] Nor, too, does the new statutory provision alter the approach to what is sometimes referred to as procedural fairness exemplified in a number of decisions of the Court. The legislation (in subs (3), (4) and (5)), although expressing this for the first time, continues the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification. A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.
>
> ...
>
> [58] Next relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[65] Also helpful is the recent decision of *Gazeley v Oceania Group (NZ) Ltd*, where Judge Perkins referred to his earlier dicta in *C v Air Nelson Ltd* in the following terms:[4]

> [45] In *C v Air Nelson Ltd*, while dealing with the previous s 103A, the Court considered and applied the full Court's decision in *V*. This was for the purposes of deciding the extent to which the Court should review the reasoning of the employer for its decision to dismiss. The Court, in *Air Nelson*, went on to state that:
>
> > [48] ... It is clear ... that the focus of the Court's inquiry must be upon the employer's actions and how the employer acted. The Court must be satisfied that in reaching its decision to dismiss, the employer adopted a logical chain of reasoning, which is

[4] *Gazeley v Oceania Group (NZ) Ltd* [2013] NZEmpC 234, (2013) 11 NZELR 276 at [45]-[46], citing *C v Air Nelson Ltd* [2011] NZEmpC 27, [2011] ERNZ 207 [*Air Nelson* (EmpC)].

> transparent and reasonable from the facts uncovered during its inquiry and presented to it. That is what the Court's review of "reasonable grounds to believe" requires. It is not for the Court ... to enter into a fact finding inquiry, of the kind which would be required for example, in a criminal proceeding. That is not the purpose of the question which the Court must answer under s 103A of the Act.
>
> [49] It would, however, be illogical for the Court to not be able to consider the factual rationale for the employer's belief. The principles are, in my view, succinctly contained within the following statement by the Court of Appeal in the Airline Stewards and Hostesses case where at 993 the Court said:
>
> > What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.
>
> And in the *Arthur D Riley* case this Court said at [52]:
>
> > Section 103A obliges the Court to take an objective approach to determining justification for dismissal. The process is essentially a review of the employer's decision to dismiss. ... The question is whether the employer was justified in his decision.
>
> ...
>
> [51] Based on the legal principles applying, the Court can appropriately inquire into whether Mr Hambleton had clear evidence upon which any reasonable employer could safely rely and/or whether he conducted reasonable inquiries, which left him on the balance of probabilities with grounds for believing, and he did believe, that the employee was at fault. The Court is then entitled to make a further inquiry into whether, even if the evidence of the employer's inquiries reasonably led to a finding of misconduct, the ultimate decision to dismiss, as opposed to taking some other disciplinary action, was justifiable applying the test under s 103A of the Act.

> [46] These principles still apply despite the amendment to s 103A but with the consideration now needed of the wider scope of options available to the employer as established in *Angus*. It is the approach to be taken in this case.

[66] I respectfully adopt these conclusions. I also note that the approach adopted in *Air Nelson* was approved by the Court of Appeal when, in refusing an application for leave to appeal, it stated:[5]

> Section 103A requires the Court to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by [the employer] when carrying out its inquiry and of its decision to dismiss [the employee]. Within that enquiry into fairness and reasonableness the Court is

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5 *Air Nelson Ltd v C* [2011] NZCA 488, (2011) 8 NZELR 453 at [19].

> empowered to determine whether [the employer] had a sufficient and reliable evidential basis for concluding that [the employee] had been guilty of misconduct.

[67] There are two particular issues that were raised for A Ltd, relating to the application of the foregoing principles in the present context. It was submitted that an employer is not obliged to undertake a criminal or even quasi-judicial process. Reliance was placed on the dicta of Chief Judge Colgan in *The Warehouse Ltd v Cooper*, where it was held:[6]

> It is fundamental employment law that an employer considering allegations of serious misconduct by an employee is not required to conduct a criminal trial or to employ a judicial process. …

[68] On this point counsel submitted that an employer is not to be judged by the standards of a court room; and that an employer conducting an investigation is not required to formally cross-examine witnesses or apply the same level of rigor as is required of skilled and experienced litigators.[7]

[69] The second issue raised by counsel relates to the question of threshold for decision-making, in a case where the potential consequences are serious. In *George v Auckland Council*, the Court of Appeal affirmed its earlier dicta in *Honda New Zealand Ltd v New Zealand Boilermakers' Union* that where a serious charge is the basis of the justification for dismissal, then the evidence in support of it must be convincing in its nature as the charge is grave.[8]

[70] As to these submissions, this Court holds that:

a) The decisions of *Cooper* and *Lewis* predated the amendments to the Act which became s 103A(3). The requirements of reasonableness enunciated in those cases must now be considered in light of the statutory prerequisites.

b) The issues in the present case do not turn on whether a judicial process was followed or whether a correct standard of proof was applied.

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6 *The Warehouse Ltd v Cooper* [2000] 2 ERNZ 351 (EmpC) at [31].

7 This submission was based on dicta in *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [19]-[20].

8 *George v Auckland Council* [2014] NZCA 209 at [35]-[36].

Having regard to the issues raised in this challenge, the focus must be on whether the allegations were sufficiently investigated (s 103A(3)(a)) and whether the employees explanations were genuinely considered (s 103A(3)(d)). A key question will be whether the allegations were considered in an even handed way.

c) Section 103A also requires a consideration of all the circumstances, which includes the sufficiency of evidence obtained in respect of a serious allegation of sexual harassment.[9] In this case there is an inter-relationship between this substantive ground and the procedural grounds which arise under s 103A(3)(a) and (d).

Were Mr H's explanations properly investigated and/or genuinely considered?

[71] It is evident from the findings made by Mr Pearce that the ultimate focus of his conclusions were on what happened after Mr H had entered Ms C's room. He recognised that there were only two direct witnesses as to what had happened there, and that there was a conflict between the two accounts as to critical details. He stated in his report that it was necessary to determine which version of events was more likely to be accurate.

[72] It was implicit in Mr H's explanation that a misunderstanding occurred, so that even if Ms C genuinely believed she had been subject to sexual harassment, there was nevertheless an innocent explanation. The question is whether this possibility was adequately investigated and/or considered by the defendant.

Credibility assessments

[73] That issue required a careful assessment of the credibility of those providing the relevant information. Such an assessment involves the practical analysis of a variety of factors, with the aim of ascertaining the truth of the circumstances under

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9 *Air Nelson* (EmpC), above n 4, at [66].

review.[10] What factors will assist in a particular case will depend on the circumstances, but may involve a consideration of such issues as:

a) Potential bias – to what extent was information given from a position of self-interest?

b) Consistency – has the person being questioned presented information (whether to another participant, or to a subsequent investigator) which is consistent throughout; is that person's information consistent with the information of other interviewees?

c) Were non-advantageous concessions freely tendered?

d) Sometimes, demeanour when providing information can assist, although scientific research has cast doubt on the possibility of being able to distinguish truth from falsehood accurately, solely on the basis of appearances.[11]

[74] A reliable assessment will require these factors to be assessed in a commonsense but even-handed way. All elements should be tested in a particular case. A finding of credibility is unlikely to be based on only one element to the exclusion of all others, and will instead need to be based on all the elements by which it can be tested in the particular case.[12]

Contextual matters

[75] In this case there are several contextual matters which are relevant to a consideration of the adequacy and even-handedness of the processes used to investigate and consider credibility:

a) Different practices were adopted with regard to the way in which information was recorded. Interviews with all persons other than Mr H

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10 *Farynia v Chorny* [1952] 2 DLR 354 (BCCA) at [8]-[9].

11 See *George v Auckland Council* [2013] NZEmpC 179 [*George* (EmpC)] at [109]. This topic has been comprehensively discussed by the High Court of Australia in *Fox v Percy* [2003] HCA 22, (2003) 214 CLR 118 at 129; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* [1999] HCA 3, (1999) 73 ALJR 306; and *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd(t/a Uncle Bens of Australia)* (1992) 27 NSWLR 326 (CA) at 348.

12 *Chorny*, above n 10, at [11].

were not recorded or transcribed. Indeed, some of those interviews (particularly the two crucial interviews held with Ms C and Mr B respectively on 12 September 2013) recorded the caveat that: "[t]hese minutes are from notes taken at the meeting and are not a verbatim account of what was said". By contrast, the two key interviews with Mr H were recorded and then transcribed. A transcription allows careful analysis of the information provided; the interviews with Mr H were able to be analysed in considerable detail by the investigator. Only a summary was prepared in respect of other interviews – especially Ms C and Mr B – which did not facilitate analysis to the same extent.

b) After the first investigation meeting where information was obtained from Mr H, there were two very significant interviews with Ms C and Mr B by telephone. As I discuss more fully below, there was insufficient questioning on key points which needed to be discussed with Ms C and Mr B. I find that a contributory factor was the mode of interview by telephone which did not facilitate the very careful questioning which was required, and assessment of credibility.

c) It is clear that when Ms C informed the other flight attendants as to what had occurred, the ISM stated that they were "furious on her behalf" and became protective. It was in this context that, as one flight attendant put it, Ms C "recounted the story about three times because as girls we all want to know the details". They were sympathetic and supportive of Ms C, who later stated she believed that sexual harassment had occurred. Mr B also reacted in a sympathetic and supportive way when he was told about these events the next day. But given these factors, it was important for the investigator to consider carefully whether or not the account given by Ms C was influenced by the reaction of colleagues. Mr Pearce said he was "sensitive" to this issue. But there is no evidence the issue was expressly raised with any of the crew during the various interviews.

d) The original complaint had four elements. The first related to inappropriate, unwelcome and offensive touching by Mr H of Ms C's leg at the crew dinner; the second involved an inappropriate unwelcome, and offensive alleged statement by Mr H beside the pool the next day, when he said "that will be something to look forward to". In respect of the first incident, Ms C said that she "got this weird feeling inside", and that in respect of the second assertion, Mr H's comment made her feel "a bit awkward, like he had other intentions" and that these intentions were of a "sexual" nature. These matters were commented on in Mr Pearce's ultimate findings. However, they were not upheld as particulars of uninvited, unwelcome or offensive conduct that was sexual in nature – unlike the incident which occurred in Ms C's room. Mr H's account with regard to the first matter was that he may have accidentally touched Ms C's leg when seated beside her at a small table; and that with regard to the second matter the full context needed to be understood, because he thought he was responding to a joke. Mr Pearce made no finding of sexual harassment with regard to the two assertions although he said Mr H's comment with regard to the second incident contributed to factors that "may provide context". That statement was equivocal, and did not amount to a complete acceptance of Ms C's account. There is no evidence that the reliability of Ms C's conclusions with regard to the central complaint were considered in light of the fact that her conclusions on the first two complaints were not fully accepted.

The parties' explanations

[76] It is now necessary to consider elements of the explanations that were given as to what had occurred in Ms C's room. The issue raised for Mr H was whether Mr Pearce undertook interviews of all witnesses "competently and even-handedly", particularly with regard to inconsistencies in Ms C's various accounts to her colleagues and to Mr Pearce; and whether Mr H's explanations were properly put to her for comment. The same points were also made with regard to Mr B's information since he was regarded as a significant witness by Mr Pearce. Mr Pearce

told the Court that he agreed with the proposition that it was critical in fairness to Mr H that the statements from Ms C and the supporting witnesses be tested in the same way as Mr H's account was tested. He contended that he had done so.

[77] Having regard to the fact that serious allegations were made, the issues which needed to be tested included:

a) Mr H said he accidentally touched Ms C's leg at the crew dinner because of the small size of the table, and that his remark beside the pool was in the context of a joke. Mr Pearce did not ask Ms C to comment on Mr H's description of these particular events. She should have been asked to do so. Whilst this matter was not the subject of an ultimate finding of sexual harassment, it is indicative of the different approach that was adopted with regard to the obtaining of information from Ms C.

b) During Ms C's first interview, she stated that she could not remember what exact words passed when Mr H came into her room but that she had not invited Mr H in. At the second (telephone) interview she said that Mr H must have said something, but that nothing sprang to mind. This contrasts with what Mr B said he was told by Ms C on the day after the incident. He understood her to say that she allowed Mr H to come into her room. These inconsistencies were not explored with Ms C. Mr Pearce said that what Mr B reported was "hearsay" implying that what Ms C had said at the time to Mr B was not relevant. The same could be said of Mr H's statements to Mr B, yet these were relied on. Nor was Ms C asked to comment on one of Mr H's statements that he had asked whether it was "okay to come in" and she had responded by saying "yes" or "yeah".

c) With regard to the issue of what happened to the blanket after Mr H sat on the bed, Ms C said in her first statement that after he had nudged her and said "move over", she did move over and "gave him the blanket [she] was under". In her first interview, she said she "scooted over to the other side of the bed and left the blanket where it was". Mr H by

contrast explained that when he sat down on the side of the bed, he ended up sitting down initially on the blanket, so he moved it from under him such that it ended up covering his right leg from about his waist down; and that he then adjusted his position which is when his hand accidentally brushed part of Ms C's leg. He said it was at this point that she moved to the other side of the bed. Mr Pearce did not explore with Ms C the different accounts that she gave regarding the handing over of the blanket. If her first account was correct, there may have been a misunderstanding on Mr H's part, a possibility that should have been explored. He did not specifically tell her what Mr H's account was.

d) A related issue was as to her location on the bed. As just mentioned, Ms C said she moved to the far side of the bed; Mr H said that she did not move from her original position until he accidentally touched her when adjusting his position. Mr Pearce did not ask Ms C to comment on the account which Mr H had given. He rejected Mr H's account on the basis that he considered it implausible that Ms C would position herself as he contended, a possibility which was not put to Ms C.

e) In Ms C's original complaint and at her first interview she stated that when Mr H was under the blanket he then said "come on". In her second interview, however, she stated that Mr H got under the blanket and lifted it up "kinda inviting me to come under the blanket with him". When specifically asked whether she recalled him saying anything she stated that from his body language and head movement she interpreted him to be indicating to her that she should "come in". Mr Pearce did not discuss either of these accounts with Mr H. At the second investigation meeting Mr Nicholson pointed out the inconsistency. Mr Pearce in his findings report referred to both versions given by Ms C and did not resolve the conflict; he ultimately concluded that Mr H had "acted/spoke toward Ms C". There is no evidence that he put the inconsistency to Ms C. He made a finding which was ambiguous.

f) Ms C gave various accounts as to the manner in which she was touched by Mr H. Initially she said that Mr H touched her lightly "on my upper inner thigh in a very sexual way".

ISM D stated that she was told by Ms C that Mr H had got under the blanket "and touched her leg"; subsequently she said it was not clear if Ms C was sitting on top of the blanket and then Mr H brushed her leg. She said she had not realised Ms C meant her inner thigh.

At the first interview Ms C stated that Mr H had touched her once on the upper inside of her leg, and a second later he did it "again".

At the second interview by telephone she said the touching was "kind of like a stroke so I'd say he started 10 centimetres under my knee and went up to 10 centimetres below my groin". This was not, she said, two attempts but one involving two touches. She said this happened after she had moved to the opposite side of the bed.

Mr H said that the touching happened as he was positioning himself on the side of the bed.

The various different accounts given by Ms C were not explored with her, and neither was she expressly told that Mr H was asserting that he had accidentally brushed the outside of her leg. Although she was asked whether the touch could have been accidental, she was not asked to comment on Mr H's account that the accidental touching occurred before she moved to the other side of the bed, as opposed to after that movement.

g) Similar issues arise with regard to Mr B's account as to what Mr H allegedly said in two telephone conversations. In his initial email Mr B stated that when he first spoke to Mr H he had referred to making a mistake in entering Ms C's room, but it was "only light-hearted fun with no other intent". In that email he referred to a second telephone conversation having occurred on the same day, but no reference was made to any such statement. In subsequent accounts, Mr B expanded

on what he had said in his email by referring to Mr H making statements in both the first and second conversations which he described not only as being a statement of "light-hearted fun" but also "light-hearted", "a bit of harmless fun", and a "light-hearted slap". This became an important issue, because Mr Pearce ultimately relied on it to draw an adverse inference against Mr H, to support his conclusion that what occurred was not accidental. Mr B was not asked to comment on the apparent inconsistencies in the several accounts he gave. I do not overlook the submission made for A Ltd to the effect that the gist of Mr B's recollection was reliable as to the nature of the comment that was made. However, the difficulty with that approach is that in the circumstances where a serious allegation of sexual harassment was under consideration, near enough is not good enough. Mr B was not asked to clarify what he had been told, and this should have occurred.

h) The above approach to questioning must be contrasted with the approach adopted with regard to Mr H at the crucial second investigation meeting. On that occasion a series of questions on all aspects of the matter were put in a penetrating and, at times, a relentless fashion. They were prepared in advance with input from Ms Chapman and possibly Mr Norton.

i) Mr Nicholson, who has had lengthy experience as an observer of such investigations stated that for a significant part of the second interview, the nature of the questions were terse, the way in which they were presented became less neutral, and that Mr H became increasingly perturbed and frustrated. Ultimately, a break had to be taken. During the second phase of the interview Mr H was reduced to tears and another break was called so that he could regain his composure.

j) It was also asserted that Mr Pearce became angry. Having listened to the audio recording of the meeting and having considered the evidence of all witnesses, although I find that questions were presented in a focused and penetrating way, I am satisfied that Mr Pearce was firm but

not aggressive. But the difficulty with what occurred was that the questions became so strident that Mr H became upset, affecting his ability to answer questions. Whilst the confrontation of an interviewee may be appropriate on some occasions, particularly if the person of interest is being evasive or is not participating in good faith, this was not such an occasion.

j) Mr Pearce ultimately preferred the account given by Ms C. He stated in the findings document that to the extent that Mr H's explanation conflicted with that of Ms C, he rejected Mr H's version of events. Yet when Ms C gave apparently differing accounts, for example as to the nature of the touching, Mr Pearce preferred the final and most incriminating version without explaining why. This was as already indicated in the context where he did not accept that sexual harassment had occurred at the crew dinner on the first night or in relation to the pool incident (though he accepted Mr H's remark may have provided "context"). Nor was Ms C questioned about Mr H's recollections in the detailed way that Mr H was questioned. Similar issues arise in respect of Mr B's information.

[78] It was submitted for A Ltd that Mr Pearce carefully examined all issues and did understand what Ms C was saying had occurred, and that Mr Pearce clearly identified and put the major issues of concern to Mr H at the second investigation meeting. The difficulty with this submission is that the "major issues of concern" were derived from interviews with Ms C and Mr B, where Mr Pearce had not elicited information with the same rigor as he applied to Mr H.

[79] It was also strongly submitted that the company was not required to conduct a formal judicial process. Subject to the circumstances, that is so. However, in this instance when attempting to resolve significant credibility issues the company's investigator did not approach his task in a fair way, because he tested Mr H's account vigorously but did not approach the evidence of Ms C and Mr B in the same manner; they too could have been questioned in considerably greater detail but were not.

[80] The procedural defects which have been identified cannot be regarded as flaws that are minor or pedantic and which did not otherwise result in the employee being treated unfairly. In this case, they amount to significant breaches of natural justice.

[81] Ms C (and others) should not regard these conclusions as casting doubt on her belief that something untoward happened in her room. It may be that a misunderstanding arose, a possibility which was not explored or considered adequately. It should be understood that the Court is required to determine whether there was clear evidence upon which a reasonable employer could safely have relied after conducting a fair and reasonable investigation. That has not occurred.

[82] The question of whether the investigation was adequate is not answered by an assertion that on any view it was inappropriate for Mr H to enter Ms C's room – even if she assented to this – and then sat on her bed beside her. As Mr H accepted, it was an error of judgment in the circumstances to have done so, particularly given the fact that Ms C was on her first ToD and aged only 19. Those actions, and the explanations he gave that he had acted unconsciously and from habit, or from social familiarity (by which he meant socialising with cabin crew in general) were potentially incriminating. But they do not in and of themselves establish a sexual motive and therefore sexual harassment. The central issue related to what happened after Mr H sat on Ms C's bed. The possibility that he was correct when he stated there was an accidental touching, and/or that there was a misunderstanding, needed to be investigated and considered. This meant that the employer did not have reliable evidence for believing the employee was at fault.

[83] I have considered the submissions made for A Ltd to the effect that the employer met its obligations under s 103A(3)(b) and (c). However, the primary concerns raised for Mr H do not involve the criteria of those sub-sections. Further, compliance with those factors does not extinguish the procedural flaws discussed above.

Disparity

[84] Mr H asserts that an issue of disparity of treatment arises, if the circumstances of his case are compared to a previous situation dealt with by A Ltd. In *Angus*, the full Court confirmed that s 103A has not affected longstanding considerations such as parity/disparity of treatment of other employees in similar circumstances, and the need for employers to comply with relevant contractual provisions and with their own unilaterally determined codes of conduct.[13]

[85] In *Chief Executive of the Department of Inland Revenue v Buchanan* the Court of Appeal confirmed that there are three separate issues which must be considered in disparity cases:[14]

a) Is there disparity of treatment?

b) If so, is there an adequate explanation for the disparity?

c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[86] A Ltd's Disciplinary Procedures and Guidelines emphasise that the relevant Manager or Team Leader conducting a disciplinary investigation must issue disciplinary action "relative to the severity of the offence and that there is consistency across the group for similar offences".

[87] As a preliminary point, I do not accept the submission for A Ltd that the company cannot be criticised for failing to take into account information that was not raised at the time by the employee. I respectfully adopt the dicta of Judge Inglis in *George v Auckland Council* who noted that an employer cannot adequately meet an argument of disparity of treatment simply by asserting that the issue was not raised by or on an employee's behalf during the course of a disciplinary process.[15]

[88] Moreover, it is unsurprising that Mr H was unaware of a previous case which was dealt with by the company in 2009. In that instance there was an investigation

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[13] *Angus*, above n 3, at [27].
[14] *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [45].
[15] *George* (EmpC), above n 11, at [68].

of a pilot in respect of six complaints made by four cabin-crew members. Four of those complaints were upheld for disciplinary purposes. The first involved a pilot holding his open hand against a flight attendant's stomach for a prolonged period of time, which upset her to the point that it affected her performance, and led her to make notes about the incident immediately after the event. The complaint was considered "finely balanced" and was a "close call" as to whether it amounted to sexual harassment. It was upheld as inappropriate behaviour amounting to misconduct. The second involved grabbing a flight attendant's face with one hand, and verbally abusing her. It was held to constitute workplace bullying, and was held to be serious misconduct. The third involved the pilot waving his finger and raising his voice at a flight attendant, and speaking to her abusively. This was found to be workplace bullying and amounted to serious misconduct. The final allegation involved the pilot poking two fingers into a flight attendant's lower abdomen area as he walked past her to leave the flight deck of an aircraft. She was upset and agitated. This was held to amount to inappropriate behaviour, and "arguably amounted to sexual harassment". This complaint too was "finely balanced and it is a close call". It was upheld at the level of misconduct.

[89] The pilot was issued with a final written warning, was required to provide a full written apology to each of the four complainants in a manner acceptable to the company and, if required by each complaint to apologise to each of them. Counselling to assist in a return to work and a fleet refresher course was directed.

[90] Overall, the conduct was just as serious as that involving Mr H, even if the findings made by Mr Pearce were justifiable. Of the four established complaints there were two of inappropriate touching just short of sexual harassment and upheld at the level of misconduct; and two further complaints of serious misconduct. Accordingly, I conclude there was disparity of treatment.

[91] It is correct that the complaints which arguably amounted to sexual harassment concerning Mr M did not occur in the flight attendants' private rooms; but the central point is that they were inappropriate and offensive actions which caused distress, as is the case with any allegation of sexual harassment if established. This explanation does not provide an adequate explanation for the disparity.

[92] Given the requirement under the Disciplinary Procedures and Guidelines that there should be consistency for "similar offences", I find that a fair and reasonable employer should have considered the earlier case; and would have concluded that the two offences were so similar to Mr H's conduct that dismissal – even on the basis of the findings made by Mr Pearce – could not be justified.

Other issues going to justification

Alternatives to dismissal

[93] Further issues were raised for Mr H, on which I can briefly express my views given the conclusions already reached.

[94] The first relates to the question of whether any outcome other than dismissal was genuinely considered. The relevant disciplinary guidelines stated that dismissal is the strongest action available to A Ltd, and should be used "after careful consideration of alternatives". The WHPP stated that where a harassment complaint was established, the harasser would be disciplined in accordance with the company's disciplinary procedures, and that this may "include transfer, counselling or therapy, formal warnings or dismissal". At the final meeting, when Mr Nicholson was provided with the opportunity of making representations as to the appropriate outcome, he referred to the WHPP and then submitted:

a) The established facts were at the lesser end of the scale; dismissal should be reserved for situations where physically inappropriate behaviour was vastly more serious than what occurred on this occasion.

b) Mr H was unaware he had done anything wrong, and the appropriate course would be to direct him either to counselling or therapy. If the company was nonetheless convinced that the facts justify something more serious, then the appropriate course was to issue a formal warning.

c) From the start, Mr H had acknowledged Ms C was upset, and had wanted to apologise to her for creating distress. It was accepted that A Ltd could reach a conclusion of sexual harassment, though not on the

> findings made. The issue for A Ltd was what the appropriate response should be. Dismissal was a "bridge too far". The company needed to look at Mr H's behaviour, and how best to effect improvement.

[95] It should also be noted that Mr Nicholson acknowledged that there was misjudgement and naivety on Mr H's part, and made a comprehensive plea to Mr Pearce to reconsider his findings.

[96] There was then a break for nearly an hour whilst Mr Pearce considered the position. He told the Court that he considered the issue of counselling in the context of three matters which he had to weigh:

a) His obligation to be fair to Mr H;

b) His obligation to provide a safe workplace for other members of the flying community; and

c) The company's obligations to uphold its Code of Conduct.

[97] After the adjournment, Mr Pearce responded mainly to the challenge that had been made to his findings. He emphasised that his conclusions were the result of very careful consideration of all the information which had been available to him. He had been mindful that Mr H was a trusted and experienced officer, but that he had entered Ms C's room and sat on her bed for no apparent or justifiable reason; consequently he saw no reason to depart from his findings. He then made the statement recorded above.[16] As to other outcomes, he simply said that he did not believe a "lesser outcome is appropriate".

[98] Although I have found that there were significant flaws in the investigative process – which may have been as a result of the advice he was receiving in that regard – Mr Pearce was well aware of the seriousness of the allegations he was examining. I have no doubt that he wished to conduct the disciplinary process in a conscientious way.

[99] However, I find that the focus of the final stages of the process was on the issue of whether the findings he had made were justified. He reiterated that he

[16] At [51] above.

considered the established facts were very serious and that he saw no reason to depart from his findings. In that context he did not explore the alternatives of counselling/therapy or the imposition of a warning adequately. These possibilities were not discussed with Mr H; and nor was there any reference to them when Mr Pearce announced his ultimate conclusions, except in a pro forma way.

[100] Had it been accepted that the touching of Ms C was accidental, it is probable that other options would have been properly discussed and explored. However, that possibility was rendered less likely by the serious view of the incident which Mr Pearce took.

Predetermination

[101] For the purposes of an apparent issue that the investigation process was affected by predetermination, there was a significant discussion in evidence as to the way in which the questioning of Mr H occurred. It is clear that prior to the second investigation meeting, Mr Pearce carefully considered the previous accounts given by Mr H and the statements made by Ms C and Mr B, and drew up a schedule of questions to put to Mr H.

[102] For Mr H it was submitted that this process and the relentless way the questions were put indicated predetermination. Counsel for A Ltd submitted that what happened was no more than evidence of a thoughtful considered and measured process, with Mr Pearce clearly and comprehensively setting out the matters about which he was concerned, providing an opportunity for Mr H to comment on them. I agree. I find that this was not evidence of predetermination, but rather the putting of the key issues about which Mr Pearce as investigator was concerned. However, this finding does not overcome the flaws which affected the investigation.

Conclusions as to liability

[103] I have also considered the second and third findings.[17] As Mr Pearce explained when providing his conclusions to Mr H and Mr Nicholson on 26 September 2013, the three issues were assessed globally. The first finding as to

[17] At [48(g)] above.

sexual harassment formed the basis of the second and third findings. Consequently, the flaws which affected the first finding affect also the second and third findings.

[104] I conclude that having particular regard to the flaws of the investigation which meant the evidence was not reliable, the decision to dismiss was not one which a fair and reasonable employer could have reached in all the circumstances of the case at the time when the dismissal occurred. This conclusion is reinforced by the failure to consider a case which involved similar conduct and the failure to carefully consider alternatives to dismissal, both of these being requirements of A Ltd's policy. The challenge accordingly succeeds.

Remedies

[105] The primary remedy sought by Mr H is reinstatement to his former position.

[106] Section 125 of the Act provides:

> **125 Remedy of reinstatement**
>
> (1) The section applies if–
>
> (a) It is determined that the employee has a personal grievance and
>
> (b) The remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in s 123(1)(a)).
>
> (2) The Authority may, whether or not it provides for any of the other remedies specified in s 123, provide for reinstatement if it is practicable and reasonable to do so.

[107] The term "practicable" is well established. In *Lewis v Howick College Board of Trustees*, the Court of Appeal affirmed the view that:[18]

> Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully.

[108] After referring to the Court of Appeal's judgment in *Lewis*, the full Court in *Angus* went on to state in respect of the issue of "reasonableness":[19]

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[18] *Lewis v Howick College Board of Trustees* [2010] NZCA 320, (2010) 7 NZELR 539 at [2], citing *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate Schoo*l [1994] 2 ERNZ 414 (CA) at 416.

[19] *Angus*, above n 3.

> [65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad enquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.
>
> [66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.
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> …
>
> [68] … The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected heath care patients in institutions.

[109] Mr H's evidence on this topic emphasised his flying career of 25 years, and after eight and a half years with A Ltd, a good employment record. This was supported by letters of appreciation from Fleet Managers; it was also confirmed that he had been involved in certain training programmes (which itself suggested confidence in him on the part of the employer). It was submitted that apart from this incident he is plainly an experienced and trustworthy pilot. He also gave evidence as to difficulties in obtaining flying roles with other airlines as a result of the dismissal, a problem which increases over time if he continues not to maintain currency as a licensed pilot. He has been unable to obtain an Australian license because he is not current and does not therefore meet the eligibility requirements for Australian airlines.

[110] Mr Pearce strongly opposed reinstatement, making these points:

a) As the relevant Fleet Manager, he no longer has the level of trust in Mr H which he is required to have.

b) A Ltd does not have any confidence that Mr H could be relied upon to always to behave in an appropriate manner if Mr H were to be rostered on overnight stops with cabin crew.

c) A Ltd opposes reinstatement because of the message it would send to other staff, including pilots and cabin crew.

d) A Ltd views sexual harassment as entirely unacceptable, and wants that message to be clearly and unequivocally understood by all staff. Such a message would be undermined if a pilot found to have committed sexual harassment is reinstated. The company wants it to be understood that sexual harassment is fundamentally unacceptable.

e) Reinstatement would reset the compass for required standards of behaviour for the whole company. It would send a message to pilots that they are somehow immune to the standard of behaviour detailed in the company documentation and expected of all other employees.

f) To reinstate Mr H would amount to ignoring the responsibility to the travelling public of New Zealand to provide an aircraft operation that is free of the impediment to flight safety that such rifts between cabin crew and pilots inevitably bring.

g) Finally, concerns were raised as to:

- A previous incident involving Mr H in the mid 1990s, which allegedly involved inappropriate touching, and following which it was understood Mr H was dismissed; Mr Pearce said this meant that he could not have confidence that sexual harassment issues would not arise in the future.

- Since Mr H's dismissal, three other female employees had informed Mr Pearce of circumstances where they believed Mr H had behaved inappropriately, leaving them uncomfortable about their working environment. Reference had also been made to an alleged fourth event. No steps had been taken to investigate these

complaints, however, because Mr H was no longer an employee of the company and there was therefore no useful purpose in doing so.

[111] It is convenient to deal first with the final matters raised by Mr Pearce:

a) The incident of a previous alleged sexual harassment involving Mr H concerns a situation which occurred some 20 years ago. The Court received evidence about it. The other person involved in the incident said that she and Mr H were well-known to each other, and that the incident caused her no distress at the time because of the context. She could not now recall whether she lodged a complaint, but it is apparent management became aware of the incident. Mr H said that when the matter was raised with him, he decided he would not contest an intended dismissal because he did not want to cause embarrassment for his friend, and he had other work available to him with another aviation company as a full-time pilot instructor. The issue was disclosed to it.

This incident clearly arose in very different circumstances from those in the present case. On the limited information available I am not persuaded that it establishes that Mr H has a propensity for sexual harassment. Indeed Mr Pearce fairly accepted that it would not be appropriate for A Ltd to attempt to investigate this matter some 20 years on. In all those circumstances it cannot be regarded as a relevant factor when assessing the practicability of reinstatement.

b) The second issue relates to the fact that there are other alleged incidents, dating from 2005. A Ltd through its counsel advised the Court that it "does not consider the substance of the concerns to be relevant, since they have not been investigated and are not at issue in these proceedings". However, Mr Pearce told the Court that he would need to investigate those concerns, were Mr H to be reinstated. It was submitted on behalf of A Ltd that given the issues of predetermination raised in this proceeding, it was inevitable that such an assertion would be raised again and that the parties would immediately be at logger-heads.

> Whether or not A Ltd may subsequently determine that an investigation of matters going back some nine years is appropriate is a matter on which it is inappropriate for the Court to comment. A decision to do so would need to be the subject of proper processes. The Court cannot forecast whether, if investigated, predetermination would be an issue, or whether an investigation into allegations could become protracted. These factors are hypothetical, and must be put to one side.

[112] The weighing of the merits of the respective cases in respect of reinstatement must focus on other issues. Mr H is an experienced pilot who has had a long career in aviation until he was dismissed over the matter which is the subject of this challenge. He seeks reinstatement, as he is entitled to do. Although the Act no longer provides that reinstatement is a primary remedy, it is an important one for the plaintiff.

[113] While the concerns raised by Mr Pearce are understandable, they are premised on an assumption that the findings he made, including the decision to dismiss, were justifiable. The Court has found that they were not. Any future employment relationship between the parties has to proceed on the basis of the findings made by the Court that Mr H's dismissal was unjustified.

[114] The Court does not accept that a decision to reinstate in the present circumstances will undermine the company's appropriately strong message to its employees that sexual harassment is entirely unacceptable, and that it wants that message to be crystal clear. Ordering reinstatement in the present circumstances would not "reset the compass" for the required standards of behaviour. That compass has already been set by the company's WHPP. That document confirms that the company considers there are three methods for dealing with harassment, ranging from a self-help approach through to management intervention/mediation and then a formal complaint procedure; the formal complaint procedure may result in a range of disciplinary outcomes.

[115] The formal complaint procedure must be undertaken in a procedurally fair way, as recognised by the company's Disciplinary Policy. The company has already recognised the complexity of sexual harassment complaints, and that they potentially

may range in severity, with dismissal being the strongest action available to the company.

[116] An important fact pointing to reinstatement relates to the Court's earlier finding as to disparity. Taken as a whole, the findings made against Mr M were serious. He was the subject of a final warning and was able to continue his employment. He was also characterised as a senior captain. Principles of consistency suggest that Mr H – in respect of whom no finding of sexual harassment stands although a conclusion that a serious error of judgment occurred – should be permitted to continue in his employment.

[117] The Court has considered very carefully Mr Pearce's concerns relating to the responsibilities owed to the travelling public to provide an aircraft operation that is free of any impediments to flight safety. There is no evidence which challenges Mr H's technical competence as a pilot, and indeed the indications are to the contrary. Moreover, given the lapse of time since the incident occurred, the hardship which Mr H has undoubtedly suffered since, and his genuine commitment to ensuring there is no recurrence, I conclude that the specific problem which was raised – the need for "unencumbered communication between cabin and flight deck" unaffected by rifts – is not likely to arise, provided that reinstatement is properly and professionally managed. Nor is there any independent evidence that elements of public confidence or safety would be compromised by Mr H's reinstatement.

[118] It is appropriate at this point to consider the issue of contributory conduct. Does Mr H's behaviour preclude the making of an order or reinstatement? In *De Bruin v Canterbury District Health Board*, the Court was required to consider s 124 of the Act, in a situation where it was minded to order reinstatement.[20] The section states:

> **124 Remedy reduced if contributing behaviour by employee**
>
> Where the Authority or the Court determines that an employee has a personal grievance , the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,–

[20] *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431.

(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[119] In *De Bruin* the Court found that the plaintiff had contributed substantially to the situation which gave rise to his dismissal. He slapped a patient on the cheek, which was, the Court held, plainly wrong and a breach of his professional obligations.

[120] Having so found, the Court stated:

> [85] It is significant that s 124 requires the Court to take contribution into account in deciding both the nature and the extent of remedies to be awarded. Where the Court concludes that there has been serious misconduct, that may well be reflected in a decision not to award reinstatement, even if that might otherwise be an appropriate option. In this case, I find that the nature and extent of Mr De Bruin's contribution to the situation giving rise to his dismissal was substantial in both respects but that it was not so great as to make reinstatement inappropriate. Rather, he should be denied all other remedies to which he would otherwise have been entitled.

[121] The Court went on to hold that the other financial remedies which were sought were not insubstantial; it ultimately concluded that in recognition of the plaintiff's contribution to the situation giving rise to his personal grievance, he was to be awarded no remedies other than reinstatement.[21]

[122] In the present case, Mr H's contribution to the situation giving rise to his dismissal was also significant. He accepted in the disciplinary process that going into Ms C's room was an error of judgment, as was sitting on her bed; the same point was repeated at the meeting when the company's findings were announced. It was accordingly submitted for A Ltd that there was a "very high degree of contributory conduct", and that this needed to be taken into account when assessing all remedies.

[123] Against the concerns raised for A Ltd must be considered the evidence of Mr H. He acknowledged the lapse of judgment on his part. He told the Court that he was prepared to do whatever it takes to satisfy A Ltd that he had learned his lesson. This included being willing to undergo counselling and/or undertake education to ensure there is no recurrence. He was also willing to provide a full

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[21] At [86]. See also *X v Auckland District Health Board* [2007] ERNZ 66 (EmpC) at [189].

written apology to Ms C and the other crew members and to accept a warning. Mr H was not cross-examined on any aspect of these statements. I accept they were genuinely proffered. Without minimising the impact of Mr H's actions, I consider he did demonstrate some insight with regard to a significant error of judgment.

[124] For Mr H it was submitted that any finding of contribution could be addressed by a recommendation to counselling/written warning under s 123(l)(d)(ii) of the Act; and also by a reduction in compensation/reimbursement for lost wages. It is not appropriate to make any recommendations under s 123(d)(ii), as that provision does not apply in the present case. However, I find in the circumstances of this particular case it is appropriate to adopt the intent of the submission made for Mr H by utilising the equity and good conscience provision of s 189(1) of the Act.

[125] Thus I consider it is appropriate to conclude:

a) That an order of reinstatement to Mr H's former position be made, subject to a recommendation that Mr H be directed to attend counselling/therapy, and that Mr H be the subject of a written warning.

b) That the financial remedies sought under s 123(1)(b) and s 123(1)(c) should be reduced having regard to Mr H's contributory conduct.

[126] Turning to the details of the financial remedies I consider first the claim for lost wages under s 123(1)(b). It was submitted that if reinstatement was ordered, this remedy would become moot since Mr H would be considered as reinstated from the time of his dismissal, and lost wages should be paid accordingly. As is evident from the conclusion reached by this Court in *De Bruin*, it does not follow that lost wages are necessarily payable in full where an order for reinstatement is made.[22] Because of Mr H's actions which contributed towards the situation which gave rise to his personal grievance, I consider it appropriate that he receive wages from the date of dismissal to the date of payment, after allowance for earnings he has since received, but that the amount to be paid by A Ltd should be reduced by 50 per cent.

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[22] See also *Trust Bank Wellington Ltd v Lavery* [1995] 1 ERNZ 105 (CA) at 108; and *X v Auckland District Health Board*, above n 21, at [227].

[127] A submission was made to the effect that Mr H had not mitigated his losses adequately, although this was not a topic on which he was cross-examined. I am satisfied from his evidence that he took reasonable steps to obtain employment following his dismissal. The parties are to resolve the quantum issues directly if at all possible, but I reserve leave to either party to apply to the Court for directions.

[128] A claim is made for compensation pursuant to s 123(1)(c)(i) of the Act, quantified at $15,000. It is accepted that this is at the high end of the scale, but that it is justified having regard to the summary dismissal and the shock caused by that. For A Ltd, submissions are made to the effect that any sum awarded should not represent punishment for harshness or for a flawed dismissal on the part of the employer,[23] and that any compensation for distress must relate to Mr H personally and not his family.[24] It was noted that no medical evidence had been provided in respect of any physical or mental illness. It was submitted that any award should be modest and in the realm of $5,000.

[129] I accept Mr H's evidence as to the emotional consequences of his dismissal including the need to seek counselling so as to deal with the emotional trauma, stress and ongoing issues. I find that an appropriate starting point is $15,000; however contributory conduct requires this to be reduced to $7,500.

[130] Finally, compensation for lost superannuation benefits is sought under s 123(1)(c)(ii). The submission was made that Mr H will need the assistance of A Ltd's payroll information to determine these. There does not appear to be any dispute that there are superannuation losses, but no evidence has been provided as to the amount of any superannuation payout at the time of dismissal. I order that Mr H's superannuation entitlements be reinstated so that he is in the same position that he would have been but for the dismissal. It is unnecessary to reduce this award for contributory conduct having regard to the contribution findings already made. The parties are to resolve the quantum issues directly if at all possible; but I reserve leave to either party to apply to the Court for directions.

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[23] *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC) at 342.
[24] *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159 (CA) at 167.

Application for permanent non-publication order

[131] Mr H has applied for a permanent non-publication order in respect of his name and any other identifying particulars, essentially relying on the decision of the majority with regard to the full Court's findings in the interim non-publication decision in this proceeding.[25] The majority concluded that such orders will be "exceptional" in the sense that they are and will be made in a very small minority of cases. The majority also concluded that an applicant for such an order did not need to make out to a high standard the existence of exceptional circumstances such that a non-publication order was warranted. Counsel for Mr H submitted that the requirement for exceptional circumstances as put forward in the minority decision is too stringent.

[132] The application was supported by the same evidence as was considered at the interim stage. Mr H has a concern as to the potential impact publication would have on his son J, and that his reputation would be irreparably damaged by publicity.

[133] As far as the first ground is concerned, the Court has been invited to consider two reports from a clinical psychologist, dated 27 January 2014 and 3 July 2014; and an assessment report from a different psychologist of May 2014. In January 2014, the clinical psychologist confirmed that Mr H's son, now aged 15, attends secondary school, and has been diagnosed with a condition known as Developmental Verbia Dyspraxia. He has a history of self-harming behaviour and was considered at that time to be at a higher than average risk of suffering adverse psychological effects if there was publicity concerning his father's case.

[134] In the updated July report, the clinical psychologist advised that J is currently engaging in self-harming behaviour to cope with distress, which is not life-threatening but which carries some risk of physical harm. The view was expressed that publicity relating to this case would increase the risk of self-harming as well as his overall level of emotional distress, which could compromise school attendance and have other repercussions.

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[25] Interim non-publication judgment, above n 1, at [46]-[98].

[135] A Ltd strongly opposes the making of a permanent non-publication order. A Ltd advanced legal submissions which relied on the reasoning of the minority decision to the effect that exceptional circumstances were required before a non-publication order could be made.

[136] No contrary evidence was placed before the Court by A Ltd by way of critique or which would otherwise challenge the expert evidence provided by Mr H. Submissions were however made to the effect that the views expressed by the clinical psychologist were mere speculation, and that J's circumstances could not be properly described as so exceptional as to justify a departure from the principles of open justice.

[137] It was submitted that in assessing the overall justice of the matter the Court should consider factors such as the interests of other pilots and former pilots, the impact on willingness of other employees to report sexual harassment issues, and the fact that the Court had now made final orders. It was submitted that all these factors pointed to publication. Nor did the assertion of reputational harm carry any weight. It was also clarified that A Ltd would not seek to publish its name in the event of the Court making a permanent non-publication order as requested by Mr H.

[138] I first consider the legal principles involved. I respectfully agree with the view as to threshold which was expressed by the majority in the interlocutory decision of this proceeding. The relevant provision for present purposes is contained in cl 12 of sch 3 of the Act which provides as follows: [26]

> **12 Power to prohibit publication**
>
> (1) In any proceedings the court may order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the court thinks fit.

[139] It is instructive to compare provisions relating to non-publication or suppression orders in other instances where either a high threshold is specifically

[26] As the full Court observed at [65], the Authority and the Court are given the same broad discretions to make non-publication orders.

provided,[27] or which require particular criteria to be considered.[28] Parliament has not done so in respect of proceedings under the Act.

[140] The next question is whether particular classes of civil cases where the High Court has relied on its inherent jurisdiction can provide a guide to the proper interpretation of cl 12. I respectfully agree with the observation of the majority that proceedings such as the present should be regarded as private litigation rather than public law litigation.[29] Clause 12 must be construed in the context of an Act that has amongst its objects the resolution of employment relationships, albeit having regard to any relevant rights which arise under the New Zealand Bill of Rights Act 1990 (such as the right to freedom of expression) and any other relevant instrument (such as, in this case, the United Nations Convention on the Rights of the Child).

[141] The principles of open justice, as articulated in many cases to the highest level[30] will also warrant very careful consideration, along with any other factors pointing to publication. But factors against publication must also be carefully assessed, so that a proper balancing exercise is undertaken. It will often be necessary for reliable evidence to be produced in relation to relevant factors especially where an application for a non-publication order is opposed.[31] Whilst the weighing of all factors must be undertaken carefully the Court or Authority must determine what outcome in all the circumstances is in the interests of justice; it does

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[27] As, for example, in respect of criminal matters under s 200 of the Criminal Procedure Act 2011, which, relevantly for present purposes stipulates as one of the grounds that suspicion would be cast on another person that "may cause undue hardship to that person".

[28] For example, as provided in s 74 of the Coroner's Act 2006, which requires an assessment of "the interests of justice, decency, public order or personal privacy"; as discussed in *Gravatt v Coroner's Court at Auckland* [2013] NZHC 390, [2013] NZAR 345 at [57]-[58]. Further examples of specific criteria are provided in ss 11B-11D of the Family Courts' Act 1980 and s 95 of the Health Practitioners' Competence Assurance Act 2003.

[29] At [74].

[30] The decision of the Court of Appeal in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) is one such authoritative expression; others are *Scott v Scott* [1913] AC 417 (HL) at 476 and 482; and *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at [42]. In *Scott* it was stated that the courts should conduct their business publically unless this would result in injustice. Open justice is regarded as an important safeguard against judicial bias, unfairness and incompetence ensuring that judges are accountable in the performance of their judicial duties: *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (HL) at 449-450 per Lord Diplock.

[31] The requirements for proper proof was emphasised in *C v Air Nelson Ltd* [2010] NZEmpC 18 at [16].

not have to find that there are exceptional circumstances. This was recently confirmed by the Court of Appeal with regards to civil cases in *Jay v Jay*.[32]

[142] Turning to the present case, the Court's primary concern relates to J's circumstances. The majority of the full Court held that there was a real risk of adverse consequences to J if Mr H's name and identifying details were published.[33] No contrary evidence has been placed before the Court by A Ltd, and indeed the further expert evidence placed before the Court reinforces the earlier evidence.

[143] The full Court considered the matter for interim purposes. I am not persuaded that the conclusions reached as to Mr H's personal grievance in this case should alter the weight of the competing factors to be considered to any significant degree. Although Mr H's conduct has been criticised in this decision, I do not consider that those findings are so significant as to persuade the Court that Mr H's name should be published, given the issues relating to his son.

[144] Additional points were made for A Ltd which were similar to those made on the interim application. I respectfully agree with the conclusions of the majority on these points, which it is convenient to repeat:

> [91] We do not accept Mr France's "floodgates" argument about the consequences of making a non-publication order in this case. It was speculative and the history of such arguments in this jurisdiction does not support it. It is not a convincing or just reason to refuse what is otherwise a meritorious submission.
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> [92] The defendant also submits that it is important to send a clear message that complaints of sexual harassment will be treated seriously; that the ability to publish the plaintiff's name may ensure a more thorough examination of past events relevant to reinstatement; and that non-publication will invite speculation about other employees of this employer. Conversely, the defendant submits that it would be futile to make the non-publication orders sought because the plaintiff's identity is already well known within the organisation.
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> [93] These submissions do not sit comfortably together. We accept the defendant's case that the plaintiff's identity is known to many within the defendant's organisation. That seems to us to address adequately the valid contention that knowledge of the identity of an alleged sexual harasser may allow other complainants to come forward. It also allows others to testify to an alleged harasser's good character in relevant circumstances. The importance of the non-publication orders not sought relates, however, to both

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[32] *Jay v Jay* [2014] NZCA 445 at [118].

[33] Interim non-publication judgment, above n 1, at [90].

> future publication and that which may take place beyond the defendant's organisation.
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> [94] In any event we are not persuaded, based on the evidence before the Court, that such orders would be futile (most particularly in so far as the plaintiff's son is concerned). Nor do we consider that the defendant's ability to make it clear that it is concerned about such matters will be unduly compromised, including having regard to the stance it has taken in relation to the proceedings.
>
> [95] We do not disagree with counsel for the defendant that complaints of sexual harassment should be treated seriously. We are satisfied, however, that such a stance will not be weakened by prohibiting publication of the plaintiff's identity on an interim basis. Although responses by some employers to allegations of sexual harassment in work situations may still be wanting, it is our perception both that this issue is improving generally and there is no suggestion that the defendant employer in this case deals with such allegations other than appropriately.

[145] I have also considered the reputational arguments raised by Mr H in his evidence. Had that been the only factor I was required to consider, I would have determined that the principles of open justice should prevail. Given the conclusion I have reached with regard to J, it is unnecessary to consider that issue further.

[146] In summary, after weighing all factors, I consider that the interests of justice require the making of a permanent order of non-publication of Mr H's name and identity.

[147] I also make permanent orders of non-publication of name and any other information identifying the complainant, and I made a permanent order of non-publication of name and any other information identifying A Ltd. I make a final order that no person, except the parties' representatives, may search or otherwise have access to the relevant files of the Court without leave of a Judge.

[148] These orders will also apply to the Authority's determination, save for the last which is modified so that no person may search or otherwise have access to the file of the Authority without leave of an Authority Member.

Conclusion

[149] The decision to dismiss was not, having regard to the flaws of the investigation conducted by A Ltd including the failure to consider a case which involves similar conduct and the failure to consider adequately other alternatives, a

conclusion which a fair and reasonable employer could have reached in all the circumstances of the case at the time when the dismissal occurred, as assessed on an objective basis. The challenge accordingly succeeds and the Authority's decision is set aside.

[150] Mr H is to be reinstated to his former position on the following terms:

a) A Ltd is to begin paying Mr H two weeks after the date of this decision.

b) A Ltd is to restore Mr H to his former position no later than four weeks after the date of this decision.

c) Mr H is to cooperate fully with any reasonable requirements of A Ltd necessary to facilitate his return to work, and is to be available to work two weeks after the date of this decision.

d) It is recommended that Mr H be directed to undertake either counselling or therapy, whichever A Ltd determines is appropriate following consultation with Mr H, with regard to the acknowledged errors of judgment on his part as described in this decision.

e) It is recommended Mr H be the subject of a written warning in respect of his acknowledged error of judgment for a period of 18 months from the date of his dismissal, 26 September 2013.

f) Leave is reserved for either party to seek variation of these terms if circumstances require it, except in respect of the warning.

[151] As to financial remedies, A Ltd is to pay Mr H lost wages from the date of dismissal to the date specified at paragraph [150] a), (i.e. the previous para) of this decision, after allowance for income earned from the date of dismissal to the date of reinstatement, reduced by 50 per cent. The parties are to resolve the quantum issues directly if at all possible, but leave is reserved to either party to apply to the Court for directions.

[152] A Ltd is to pay Mr H compensation under s 123(1)(c)(i) in the sum of $7,500.

[153] A Ltd is to pay to Mr H compensation for the lost superannuation benefits, so that he is in the same position as he would have been but for the dismissal. The parties are to resolve the quantum issues directly if at all possible, but leave is reserved to either party to apply to the Court for directions.

[154] There are final orders for non-publication in terms of paras [146] - [148] of this decision.

Costs

[155] Subject to any factors of which I am currently unaware, Mr H is entitled to a contribution to the costs incurred in this proceeding by him or by his union on his behalf. The parties are encouraged to agree costs if possible but, failing agreement, memoranda should be provided. Mr H will have 21 working days in which to do so; A Ltd will have a further 21 working days in which to respond.

B A Corkill
Judge

Judgment signed at 3.30 pm on 7 October 2014