NOTE: EMPLOYMENT COURT ORDERS PERMANENTLY PROHIBITING PUBLICATION OF THE NAME AND IDENTIFYING PARTICULARS OF A LTD, MR H AND MS C REMAIN IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA638/2014
[2016] NZCA 419

BETWEEN	A LTD Appellant
AND	H Respondent

Hearing:	15 June 2016
Court:	Ellen France P, Randerson and Cooper JJ
Counsel:	J G Miles QC and P A Caisley for Appellant R E Harrison QC and C Abaffy for Respondent
Judgment:	7 September 2016 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The approach of the Employment Court in determining whether A Ltd had sufficiently investigated the allegations against Mr H for the purposes of s 103A of the Employment Relations Act 2000 was not correct in law.

C The orders of reinstatement, payment of wages and compensation made by the Employment Court are set aside. The matter is remitted back to the Employment Court to determine remedy.

D The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Ellen France P)

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Introduction

[1] The issue on this appeal is whether, in deciding A Ltd's investigation into allegations against Mr H was not sufficient for the purposes of s 103A of the Employment Relations Act 2000 (the Act), the Employment Court erred in law.[1]

[2] The issue arises as a result of an investigation by A Ltd into an incident that took place between Mr H, a pilot employed by A Ltd, and the complainant, Ms C, a flight attendant with A Ltd, while Mr H and Ms C were on an overseas layover. A Ltd decided to dismiss Mr H after the investigation on the basis he had contravened the airline's sexual harassment policy and his actions amounted to serious misconduct. Mr H brought a claim alleging an unjustifiable dismissal for a number of reasons including deficiencies in the investigation.

[3] The Employment Relations Authority concluded the process leading to the dismissal was justifiable and dismissed the application for a personal grievance.[2] Mr H successfully challenged the decision before Judge Corkill in the Employment Court and Mr H was reinstated. This Court granted A Ltd leave to appeal on the following question of law:[3]

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1 *H v A Ltd* [2014] NZEmpC 189 [Employment Court decision].
2 *A v B Ltd* [2014] NZERA 131 [Employment Relations Authority decision].
3 *A Ltd v H* [2015] NZCA 99 [leave decision].

> Was the approach of the Employment Court in determining whether A Ltd had sufficiently investigated the allegations against [Mr] H for the purposes of s 103A of the Employment Relations Act 2000 correct in law?

[4] Section 103A(1) of the Act relevantly provides that the question of whether a dismissal was justifiable is to be determined objectively applying the test in s 103A(2). That 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.

[5] It is accordingly necessary to consider the Judge's approach in light of s 103A. We do so after first setting out the background.

Factual background

[6] We largely adopt the description of the narrative in the Employment Court judgment.[4] The events in issue date back to August 2013 when Mr H, then aged 51, and Ms C, then 19 years of age, were on a tour of duty in the Pacific. Ms C commenced employment with A Ltd at the beginning of that month. The other members of their flight crew were Captain B, two other flight attendants, Ms A and Ms E, and the inflight services manager, Ms D. The crew had a two-night layover prior to their return flight to New Zealand. The crew members stayed at the one hotel and had adjacent rooms.

[7] The crew had dinner together on the first night of the layover, 17 August. Ms C said that at one point Mr H "briefly almost stroked" her leg under the table. Conversation continued and she though it must have been accidental but she felt "weird". Mr H later said he was unaware of touching Ms C's leg but it could have occurred accidentally given the small size of the table and the number seated around it.

[8] On the second day of the layover, 18 August, Mr H and the three flight attendants were beside the pool talking. Ms C said she was tempted to go for a swim. She said Mr H responded "that might be something to look forward to".

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4 Employment Court decision, above n 1, at [2]–[52].

Mr H later said the statement was taken out of context. That afternoon Mr H went into Ms C's hotel room. She said he sat on her bed, got under a blanket, reached across and touched her thigh in a sexual manner. Mr H's account was that he had gone into the room to inquire about Ms C's welfare. He went over to the bed and nudged Ms C twice on the shoulder to indicate she should move over to make room for him. He said he initially sat on the blanket on the bed and then adjusted it. While repositioning himself he accidentally brushed against the outside of Ms C's leg.

[9] Ms C told the other flight attendants and the inflight services manager of the incident later that day. The next day, on 19 August, she told Captain B and said she would be filing a complaint. Captain B told Mr H on the morning of 20 August after the crew had returned to New Zealand. Captain B said Mr H agreed that he had made a mistake going into the room but it was light-hearted fun without any other intentions. Ms C made a written complaint to A Ltd on 20 August. The fleet manager, Hugh Pearce, decided it was appropriate to investigate further.

[10] On 23 August 2013, Mr Pearce interviewed the complainant and Ms A. On 26 August he interviewed Ms D and Ms E. That same day Mr Pearce conducted a telephone interview with Captain B.

[11] On 27 August, Mr Pearce wrote to Mr H informing him an investigation would take place and advising that he wanted to meet with Mr H to consider whether Mr H should be stood down during the investigation. The letter attached a copy of Ms C's complaint, notes of the interviews with the other crew members, and copies of A Ltd's code of conduct and relevant policies.

[12] Mr Pearce then met with Mr H and Mr H's union legal representative on 29 August to discuss standing down Mr H in the interim. Mr Pearce decided that Mr H should be stood down and confirmed that decision in a letter of 30 August.

[13] Mr H provided a statement to Mr Pearce dated 4 September. Mr Pearce met again with Mr H on 5 September. Mr H gave Mr Pearce copies of the other witness

statements with Mr H's annotations. At this meeting, Mr Pearce asked Mr H to explain his recollection of the events.

[14] After that meeting, on 12 September, Mr Pearce conducted a telephone interview with Ms C and with Captain B. There was a further interview with Mr H on 16 September. Copies of notes of the further interviews with Ms C and Captain B had been provided to Mr H. Mr H had again recorded his responses by annotating copies of the notes and he gave them to Mr Pearce at the meeting on 16 September.

[15] After this meeting, Mr Pearce prepared a comprehensive "findings document", which reached the conclusion the allegations had been substantiated and amounted to serious misconduct. Mr Pearce rejected Mr H's explanation that he went into the room to inquire about Ms C's welfare and that the touching was accidental. Mr Pearce placed weight on the absence of any explanation as to why Mr H might think Ms C's welfare was in issue and on the fact he did not mention this concern to Captain B. Mr Pearce thought it was "inexplicable" that Mr H would enter a flight attendant's room and sit down on the bed in the way he did. It was also implausible in the circumstances that Ms C would position herself on the bed in such close quarters to Mr H as would have been necessary for the accidental touching described by Mr H to have occurred. Finally, Mr Pearce considered the accounts of the other witnesses supported Ms C's account.

[16] Mr Pearce's findings were presented to Mr H at another meeting on 26 September. Mr Pearce told Mr H he was considering terminating Mr H's employment. Mr Pearce invited comments. After an adjournment, Mr H's representative made lengthy representations on his behalf. Mr Pearce considered those representations during a further adjournment and then advised Mr H that his employment would be terminated. This conclusion was confirmed in writing on 1 October.

The statutory scheme

[17] Section 103A is found in pt 9 of the Act dealing with personal grievances, disputes and enforcements. The object of pt 9 is set out in s 101 and includes the following:

(a) to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; and

(ab) to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship; and

(b) to continue to give special attention to personal grievances, and to facilitate the raising of personal grievances with employers; and

…

[18] Section 102 makes it clear that employees may pursue personal grievances under the Act. A personal grievance is defined in s 103(1) and includes a grievance because of a claim that the employee has been unjustifiably dismissed.[5]

[19] Section 103A sets out the test of justification. It is helpful to set out the section in full:

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

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5 Employment Relations Act 2000, s 103(1)(a).

(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.

The Employment Court decision

[20] The Judge saw the questions arising as whether the allegations were sufficiently investigated as required by s 103A(3)(a) and whether the employee's explanations were genuinely considered in terms of s 103A(3)(d). This meant, the Judge said, whether the allegations had been considered in an "even-handed" manner and whether Mr H's explanation that the touching was accidental was adequately investigated.[6]

[21] The Judge concluded that Mr Pearce had tested Mr H's account vigorously but had not taken the same approach to the evidence of Ms C or to that of Captain B.[7] The Judge concluded these procedural defects were not pedantic or minor flaws that did not otherwise result in the employee being treated unfairly under s 103A(5). Rather, they were significant breaches of natural justice.[8] As a result, A Ltd did not have reliable evidence for believing Mr H was at fault.[9]

[22] Judge Corkill also accepted there was an issue of disparity of treatment. The Judge compared Mr H's case to sanctions imposed by A Ltd on another pilot for similar complaints in 2009. The Judge found that a fair and reasonable employer should have considered the earlier case and "would have concluded that the two

6 Employment Court decision, above n 1, at [70(b)].
7 At [79].
8 At [80].
9 At [82].

offences were so similar to Mr H's conduct that dismissal … could not be justified".[10]

[23] Accordingly, the Judge found that, given the procedural flaws, the evidence was not reliable and so the decision to dismiss was not one that a fair and reasonable employer could have reached in all the circumstances at the time the dismissal occurred. The disparity issue and a failure to consider alternatives to dismissal reinforced that conclusion.[11] Mr H's challenge succeeded and the Judge ordered reinstatement, payment of wages and compensation.

The issues

[24] The way the case has developed the issue for us is whether, as Mr H contends, the Judge has simply made an evaluative judgment on the facts or whether, as A Ltd submits, his approach involved an error of law.

[25] A Ltd's argument can be summarised in this way. First, the Judge has erred in applying a standard under which all witnesses had to be examined in the same level of detail and in the same way irrespective of the circumstances. Secondly, the level of detail considered by the Judge was such that the Court has effectively substituted its judgement for that of the employer. Finally, it is submitted that the Judge has required the employer to undertake an investigation akin to a judicial inquiry.

[26] For Mr H, Mr Harrison QC submits the challenge is one to the Judge's conclusion based on his evaluation of the evidence. The complaint is about the factual conclusions in a situation where it cannot be said there was no evidence to support the conclusions reached.[12] In developing this submission, Mr Harrison says the Judge did not purport to lay down general rules. In particular, the Judge did not impose an incorrect standard of "even-handedness". Rather, Judge Corkill was concerned to ensure consistency in the evaluative approach to credibility and he cannot be criticised for that.

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10 At [92].
11 At [104].
12 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26].

[27] Mr Harrison emphasises that the important issue was whether the touching was accidental or deliberate. Mr Pearce had cross-checked Mr H's account against what Captain B said Mr H had told him but there was no similar cross-checking of Ms C's account. An associated illustration of the lack of consistency was that Mr Pearce took the view Ms C's reported statements to others were to be disregarded as "hearsay" but he relied on statements from Captain B as to the latter's reports of telephone discussions with Mr H. Finally, Mr Harrison draws support from Mr Pearce's acceptance in cross-examination 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.

Analysis

[28] In order to assess the competing contentions we first need to say a little more about the Employment Court decision. The starting point is that Judge Corkill acknowledged the factors relevant to the determination of credibility would depend on the circumstances. The Judge listed four factors that he suggested might assist:[13]

> 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.

[29] The Judge explained that "[a] reliable assessment will require these factors to be assessed in a commonsense but even-handed way" and that "[a]ll elements should be tested in a particular case."[14] Judge Corkill took the view that it was unlikely a finding of credibility would be based on "only one element to the exclusion of all

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13 Employment Court decision, above n 1, at [73] (footnote omitted).
14 At [74].

others, and will instead need to be based on all the elements by which it can be tested in the particular case".[15]

[30] Judge Corkill noted there were a number of contextual matters relevant to consideration of the adequacy and even-handedness of the approach in this case. The Judge listed four factors relevant to the consideration of the sufficiency of the approach.[16]

[31] The first of these factors was the difference in approach in the way information was recorded. Interviews with the witnesses other than Mr H were not recorded or transcribed but rather notes were taken. By contrast, the two key interviews with Mr H were recorded and transcribed.[17] Secondly, there was "insufficient questioning" of Ms C and Captain B on important issues.[18] Thirdly, insufficient consideration was given to whether or not Ms C's account was influenced by the protective reaction of her colleagues to her initial complaint.[19] Finally, Mr Pearce had not treated the two earlier episodes recounted by Ms C, namely, the incident at dinner the previous night and the poolside conversation, as "particulars" of conduct "that was sexual in nature".[20] The Judge was concerned about whether Mr Pearce had taken into account the reliability of Ms C's evidence on the incident in the hotel room in light of the fact what she said about these other two incidents was not "fully accepted".[21]

[32] The Judge then identified 11 issues that in his view needed to be tested.[22] These included what were seen as inconsistencies in the accounts of Ms C and Captain B that were not tested by Mr Pearce. Two examples of the issues identified will suffice.

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15 At [74].
16 At [75].
17 At [75(a)].
18 At [75(b)].
19 At [75(c)].
20 At [75(d)].
21 At [75(d)].
22 At [77].

[33] First, the Judge considered Mr Pearce should have explored with Ms C "the different accounts that she gave regarding the handing over of the blanket".[23] To put this in context, the Judge explained as follows:[24]

> 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.

[34] The point being made was that, if Ms C's first account about how Mr H came to be under the blanket was correct, this may have supported the conclusion there was a misunderstanding on Mr H's part. The Judge also said Ms C should have been told what Mr H's account was.

[35] The second illustration relates to Captain B's account as to what Mr H told him in two telephone conversations. The Judge explains this issue as follows:[25]

> In his initial email [Captain] 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 [Captain] 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. [Captain] B was not asked to comment on the apparent inconsistencies in several accounts he gave. … [Captain] B was not asked to clarify what he had been told, and this should have occurred.

[36] Obviously, as Mr Miles QC accepts, it cannot be problematic in a legal sense if the Judge's references to even-handedness mean adopting a balanced approach. The position is, however, different if the Court is saying that invariably the requirements in relation to the questioning of each witness is to be the same. We

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23 At [77(c)].
24 At [77(c)].
25 At [77(g)].

consider that was the approach adopted, that is, to effectively proceed on the basis there was a rule requiring all of the witnesses to be questioned in the same way and to the same level of detail. To put it another way, even-handedness was treated as requiring the level of rigour adopted towards each of the witnesses to be commensurate.

[37] As we shall explain, that approach ignored the statutory injunction that what is fair and reasonable must be assessed "in all the circumstances".[26] It also ignored the requirement in the Act to consider whether the employer's actions were what a fair and reasonable employer "could", not "would", have done.

[38] The circumstances were all important in this case. As to the general circumstances, there was common ground. Mr Pearce was faced with a situation in which a 51-year-old man had entered the hotel room of a 19-year-old novice flight attendant, whom he had never met prior to the trip, and sat on her bed under a blanket. Mr H accepted there were chairs he could have sat on and that touching occurred. Further, there were difficulties with the explanation that Mr H gave for entering Ms C's room and that explanation did not appear to have been advanced prior to the investigation commencing. Mr Pearce was accordingly entitled to structure his approach around the inherent implausibility of an innocent purpose and accidental touching in these circumstances.

[39] *De Bruin v Canterbury District Health Board*, a decision of the Employment Court relied on by Mr H, illustrates the point that the extent of inquiry required is affected by the circumstances.[27] That case involved a challenge to summary dismissal by an experienced mental health nurse who, whilst managing a difficult patient, had responded to an attack on him with a slap to the patient's face. He had also restrained the patient by kneeling on her. The Court considered the circumstances in which the slap occurred were "critical to any conclusion reached about the seriousness" of Mr de Bruin's conduct.[28]

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26 Employment Relations Act, s 103A(2).
27 *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431.
28 At [48].

[40] There were two other witnesses to the incident involving the slap. One of these supported Mr de Bruin's evidence the slap was a reflexive response. The other witness when asked about this did not directly answer the question. In deciding to dismiss, the investigator concluded the slap was deliberate. She had not put that conclusion to Mr de Bruin or the first witness and had not gone back to the second witness on this point. Further, the Judge said there was "little inquiry" about the degree of force used, with one witness describing something "more than a tap" but which left no mark.[29] The other witness said nothing about the force used and was not asked. Mr de Bruin's evidence was that the slap left no mark and would not have hurt the patient. The Court concluded further inquiry into these matters was necessary and the investigation was insufficient under s 103A(3)(a) of the Act. The circumstances of that case were quite different from A Ltd's investigation given the features of the present case that we have identified at [38] above.

[41] The impact of the requirement that the assessment is as to what a fair and reasonable employer "could" have done was discussed by the Full Court of the Employment Court in *Angus v Ports of Auckland Ltd (No 2)*.[30]

[42] As the Employment Court noted, the use of the word "could" in the present s 103A reflected a legislative change. The submissions for Mr H make the point that the Employment Relations Act as enacted in 2000 did not specify what was meant by the phrase "unjustifiably dismissed" in s 103(1)(a). That position changed in 2004 when the Employment Relations Amendment Act (No 2) 2004 inserted s 103A. At that time, s 103A provided that whether a dismissal was justifiable was to be determined objectively by considering whether how the employer acted was "what a fair and reasonable employer would have done in all the circumstances". The legislative materials suggest the use of the word "would" was intended to alter the effect of this Court's decision in *W & H Newspapers Ltd v Oram,* which was seen as requiring consideration of what the employer "could" have done.[31]

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29 At [50].

30 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466.

31 *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29 (CA); Employment Relations Law Reform Bill 2003 (92-1) (explanatory note) at 6 and 24; Employment Relations Law Reform Bill 2003 (92-2) (select committee report) at 15–16; and see the comments of the Minister of Labour, Hon Paul Swain, in the second reading debates: (5 October 2004) 620 NZPD 15822.

[43] The present version of s 103A was introduced by the Employment Relations Amendment Bill (No 2) 2010.[32] The explanatory note recorded that the change from "would" to "could" recognised "that there is a range of fair and reasonable responses (actions and courses of action) that could be made by an employer in any situation".[33] The explanatory note also noted that the introduction of minimum requirements of a fair and reasonable process was "intended to ensure that minor or technical defects in an employer's processes" will not be decisive.[34]

[44] The Employment Court in *Angus* saw the change from "would" to "could" as "neither ineffectual nor even insignificant".[35] Rather, the use of the word "could" contemplated that justification is not to be determined "by a single standard of what a notional fair and reasonable employer in the circumstances would have done".[36] The Court said the new s 103A required an objective "case by case" assessment of what the employer did and how a fair and reasonable employer in those circumstances could have acted.[37]

[45] The Court noted that the four considerations set out in s 103A(3) may be seen as "the legislative successors to the simpler and more general guidelines" the Court had set out in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*, that is, requiring notice, the opportunity to refute the allegation, and consideration.[38] Finally, the Court stated that subs (4) confirmed the considerations in subs (3) were not exhaustive and that subs (5) equated with the Court's previous approach.[39]

[46] It is apparent that the effect of the statute is that there may be a variety of ways of achieving a fair and reasonable result in a particular case. As the Court in *Angus* observed, the requirement is for an assessment of substantive fairness and

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32 The change took effect from 1 April 2011: Employment Relations Amendment Act 2010, ss 2(2) and 15.
33 Employment Relations Amendment Bill (No 2) 2010 (196-1) (explanatory note) at 4.
34 At 4.
35 *Angus v Ports of Auckland Ltd (No 2)*, above n 30, at [22].
36 At [22].
37 At [25].
38 At [47] citing *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* (1990) ERNZ Sel Cas 582 (Labour Court) at 594–595.
39 At [55]–[56].

reasonableness rather than "minute and pedantic scrutiny" to identify any failings.[40] In our view, there has been a departure from that requirement in this case.

[47] In addition to our earlier observation about the general circumstances, it is relevant that the key difference between the accounts of Mr H and Ms C was whether the touching was accidental. We accept there may be cases where the circumstances require the investigator to challenge the complainant in a more rigorous manner than was the case here in order to meet the requirement in s 103A(3)(d) of genuine consideration of the employee's explanations. But Mr Pearce directly put to Ms C whether the touching might have been accidental and in the circumstances there cannot have been a requirement to further test her on that point.

[48] Further, while there were changes in some of the matters of detail in Ms C's account such as to what occurred in relation to the blanket and the exact nature of the touching, these changes were not such as to necessarily call into question her reliability so that a different approach to questioning her was required. Her account, while unsurprisingly adding some additional detail as the investigation proceeded, was essentially consistent in terms of the key features.

[49] For example, in her formal complaint Ms C said Mr H had lightly touched her on her upper inner thigh. She was subsequently more explicit about the extent of the stroke and suggested the touching occurred twice. However, in the circumstances, what was important was her initial description of the touch as occurring "in a very sexual way" and her account never varied in that respect. She also clarified that the two touches happened almost instantaneously. We note too that Mr Pearce said he found nothing to indicate Ms C's version of events had materially altered as a result of the fact the other crew members had rallied round her and supported her at the time she spoke to them about the incident.

[50] The fact Mr Pearce did not make findings of sexual harassment in relation to the two earlier incidents did not add in any substantive way to the assessment of the incident in the hotel room. Nor does his agreement in cross-examination that

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[40] At [26].

fairness required the accounts to be tested in the same way alter the assessment of whether the Court has erred in its approach.

[51] It is also relevant that the accounts of the other witnesses were not inconsistent in any significant way. The other two flight attendants and the inflight services manager essentially gave evidence in the nature of recent complaint. In addition, their evidence provided some assistance on the general context as to the group's engagement over the two days of the layover.

[52] Importantly, Captain B's account remained broadly consistent. It was highly relevant that the explanation Mr H was concerned about Ms C's welfare was, on Captain B's account, never mentioned. The fact his recollection of Mr H's description of the nature of the incident varied slightly was immaterial. That is because it was open to conclude from what Captain B said that Mr H was essentially describing harmless, rather than accidental, touching. Captain B was consistent throughout on the key aspects and Mr Pearce was entitled to give weight to his evidence. It was evidence in the nature of an admission and could as such be treated differently from what were seen as "hearsay" accounts from other witnesses.

[53] Finally, in the circumstances as we have described them, nothing turned on the interviewing or recording techniques adopted. There was, for example, no issue of substance arising as to whether any aspect of the record was accurate.

[54] These matters lead us to the conclusion that the Judge has in effect applied a set of rules that has got in the way of a direct application of the statutory test. On this basis, the appeal must be allowed.

Remedy

[55] The Employment Court ordered reinstatement as well as payment of wages and compensation. However, there are two difficulties with this Court seeking to deal with remedy. First, as this Court in declining leave to appeal on the question of disparity observed, "the matters raised by A Ltd [on disparity] are case-specific questions of fact, not law" and therefore did not meet the test for granting leave

under s 214 of the Act.[41] Secondly, there have been further developments since the Employment Court decision that may impact on remedies. In particular, we were advised that after Mr H was reinstated a new investigation into other allegations of sexual harassment was commenced and there has been a further decision of the Employment Court in relation to that investigation.

[56] In these circumstances, we see no alternative but to refer the question of remedy back to the Employment Court for further consideration. The question of disparity can be considered as part of the reconsideration in the Employment Court.

Result

[57] For these reasons we answer the question on which leave was granted in the negative. The approach of the Employment Court in determining whether A Ltd had sufficiently investigated the allegations against Mr H for the purposes of s 103A of the Act was not correct in law. The appeal is allowed. The orders of reinstatement, payment of wages and compensation made by the Employment Court are set aside. The matter is remitted back to the Employment Court to determine remedy.

[58] Costs should follow the event. The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Kiely Thompson Caisley, Auckland for Appellant
New Zealand Airline Pilots Association Inc, Auckland for Respondent

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41 Leave decision, above n 3, at [5].