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Court of Appeal Rejects Sexual Harassment Appeal

The Court of Appeal in ***Air Nelson Limited v. C*** [2011] NZCA 488, has recently had the opportunity to consider the legal principles surrounding the justification of a termination of employment for sexual harassment, in an application by Air Nelson for leave to appeal an Employment Court determination.

The facts of the case involved a female flight attendant ("*FA*") who made a complaint of sexual assault to the police against a pilot "*C*" (who was the Captain of a Dash 8 Aircraft), alleging the sexual assault occurred during an unscheduled overnight stop at Napier.

In addition to the flight attendant and Captain, a First Officer "*FO*" was also one of the three crew involved in the overnight stop.

The undisputed facts, confirmed by all three crew members, were that they purchased four bottles of wine and six 330ml bottles of beer. The crew took steps to ensure they could not be identified as Air Nelson employees before purchasing the alcohol. After arriving at the hotel, the crew members changed from their uniforms into robes supplied by the hotel and met in the Captain's room for drinks.

In respect to what then subsequently occurred the Court of Appeal outlined the facts as follows:

"What followed in C's room is the subject of controversy. It is undisputed that all three consumed a significant amount of the alcohol. In statements later made to the police, C and FO allege that at one stage all three lay together on C's bed, dressed only in their underwear and robes, while they drank; that all three spoke coarsely about sex; that FA volunteered that she did not care whether she had sexual intercourse with a married man (C was married); that she exposed her breasts and belly to display her body piercing; and that the alcohol consumption stopped at around 11.30 pm as required to ensure an eight hour alcohol free break before the pilots recommenced duties at 7.30 am the next day.

At about midnight FO decided to go to his room, leaving C and FA in C's bed lying under the bed covers. By that time, the three had consumed the six bottles of beer and two bottles of wine. According to C and FO, FO tipped out the contents of the other two bottles of wine the next morning.

According to C, he and FA fell asleep in his bed. He awoke at about 4 am when FA, who was by now fully naked, was attempting to arouse him sexually. Sexual intercourse then took place. Afterwards, at about 4.30 am, FA put on her robe and left the room. He did not see her again before reporting for work at 7.30 am.

FA is unable to remember anything after about midnight. Her last memory is of sitting in C's room with a half full glass of wine. Her next memory is of standing inside C's room by the entrance door, wearing her bathrobe but nothing else. She went to her room, where she realised she had participated in sexual intercourse with C. This caused her distress. She did not think she would have willingly consented. She rang a friend at about 4.30 am. Her friend's evidence was that when she arrived at the hotel FA was in a very distraught state and still appeared to be under the influence of alcohol.

FA made a complaint of sexual assault to the police. After undertaking an inquiry, the police decided not to prosecute C."

Air Nelson carried out an internal investigation in respect to the Captain's alleged conduct and reached a conclusion that the Captain was guilty of serious misconduct in relation to the purchase and subsequent consumption of alcohol and his sexual harassment of the Flight Attendant by unwelcome sexual activity, including sexual intercourse. Air Nelson dismissed the Captain.

The Captain challenged the termination of his employment and sought reinstatement. The Employment Relations Authority determined that the Captain had been justifiably dismissed however the Employment Court determined that Air Nelson's internal investigation was fundamentally flawed and ordered that the Captain be reinstated.

Air Nelson identified three questions of law it relied upon in respect to its application for leave to appeal the Employment Court determination.

1. In respect to the test of justification (applicable at this time) for the dismissal provided for in section 103A of the Employment Relations Act 2000, Air Nelson argued that the Employment Court inquiry must be limited to the question of whether the employer's investigation was fair and reasonable and if so what the employer reasonably and honestly believed about the misconduct judged against the standards of a fair and reasonable employer. Air Nelson claimed that the Employment Court was not able to consider "*events afresh*" or reach its own view of the facts.

The Court of Appeal noted:

"Section 103A requires the Court to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by ANL when carrying out its inquiry and of its decision to dismiss C. Within that inquiry into fairness and reasonableness the Court is empowered to determine whether ANL had a sufficient and reliable evidential basis for concluding that C had been guilty of misconduct.

The Judge followed that approach when reviewing ANL's findings of misconduct against C relating, first, to his purchase and subsequent consumption of alcohol and, second, to his alleged sexual harassment of FA. After examining the evidence, Judge Perkins concluded that ANL's findings on both issues could not be justified according to the standard of what a fair and reasonable employer could have done in all the circumstances. Among other things, he found that Mr Hambleton did not undertake his investigation with an open mind; and that he failed to assess the relevant evidence in a fair and balanced way. The Judge's s 103A evaluation was of an essentially factual nature. . ."

The Court of Appeal determined that they could not identify any error of law on the Judge's behalf and therefore determined that this issue could not be the subject of an appeal because it related to a factual evaluation by the Employment Court.

2. The second question of law raised by Air Nelson was whether the Employment Court had correctly applied the legal principles applicable to allegations of "*sexual harassment*", in particular whether the Judge had misdirected himself to the consent element of the allegation of sexual harassment. In this regard Air Nelson referred to the Employment Court's finding that the flight attendant had *"brought the situation upon herself when concluding that she followed a premeditated course of seducing C into having sexual intercourse with her."*

   In this regard the Court of Appeal noted:

   ". . . The Judge's reversal of ANL's sexual harassment finding was again of an essentially factual nature within his wider s 103A inquiry. However, while the Judge's conclusion that FA seduced C did not constitute a discrete ground for rejecting ANL's findings, we agree with Mr Waalkens that his finding was unnecessary in the context of determining whether there was a sufficient and reliable evidential basis for ANL's decision.

   We are not satisfied that the Judge's evaluation of the sexual harassment ground for ANL's decision raises an arguable question of law."

3. The third question of law was whether the Employment Court had misdirected itself by failing to take into account all relevant criteria, in particular ANL's statutory and regulatory responsibilities under the Civil Aviation Act 1990 and the Civil Aviation Rules, or by regarding irrelevant criteria, to conclude that reinstatement to the role of Captain was practicable.

The Court of Appeal noted:

"However, as Mr Haigh points out, Mr Waalkens is unable to identify any particular statutory or regulatory provision of which ANL's performance may be compromised by reinstating C as a pilot. The Judge expressly recited that ANL had not led any evidence from witnesses independent of the company that public safety or confidence would be comprised by C's reinstatement. Instead, ANL's case was that it was not practicable to reinstate C where he would be required to fly with crews who were aware of this incident and whose confidence in him may be impaired. The Judge concluded that this evidence was exaggerated. Again, that was a purely factual determination.

We are not satisfied that the Judge's finding on reinstatement raises an arguable question of law."

The Court of Appeal therefore determined that Air Nelson had not identified any question of law which would provide grounds for leave to be granted for Air Nelson to appeal the Employment Court determination and therefore that determination stands.

While the Court of Appeal determination was not a substantive one it provides a useful summary of the Employment Court determination and highlights the extent to which an employer's investigation into what was in this case highly sensitive subject matter, will be subject to scrutiny by the Employment Court.

Changes to Justification and Reinstatement

It may be of some relief to employers that the test for justification of a dismissal has now changed so that the test is not what "*would*" a reasonable employer do, but rather what "*could*" a reasonable employer do. Also, reinstatement is no longer the primary remedy for an unjustified dismissal. The effect of these changes has recently been examined by the Employment Court in the following cases, both in interim reinstatement settings:

- ***McKean v. Ports of Auckland Limited*** [2011] NZEmpC 128: *"The question under s 103A, as amended, is whether the decision to dismiss was one that a reasonable and fair employer could have taken in the particular circumstances. It is apparent that Parliament intended to widen the circumstances in which an employer can justify a dismissal. This is reflected in the substitution of the word "could" for "would". It is tolerably clear that, as amended, s 103A reflects a statutory acknowledgement that there is likely to be a range of responses open to a fair and reasonable employer in any particular case . . ."*
- ***Angus v. Port of Auckland Limited*** [2011] NZEmpC 125*: "Parliament has changed the previous position and, in very general terms has both sought to make it easier for employers to justify dismissals and to make it more difficult for employees to be reinstated if they have been unjustifiably dismissed."*

We are now awaiting a substantive determination which deals with the impact of the changes and will keep you informed of any further decisions regarding the legal principles to be applied in determining whether a dismissal is justified and when reinstatement will be viewed as being "*practicable*".

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