



## A Touching Story

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A recent decision of the Employment Court, *H v. A Ltd* [2014] NZEmpC 189, ordered that a pilot, who had been dismissed for sexual harassment, be reinstated to his position. The decision highlights the potential complexities when dealing with a scenario when there are only two direct witnesses to an alleged incident and there is a conflict between the accounts as to the critical details. Faced with conflicts of this nature the Employment Court has detailed the obligations upon an employer when determining which version of events is to be preferred.

The facts before the Employment Court involved a complaint by a flight attendant, Ms C, that a pilot (Mr H) had sexually harassed her during a lay-over on a tour of duty from New Zealand to a Pacific destination. The Employment Relations Authority held that the decision to dismiss Mr H was justified. Mr H challenged the Authority determination to the Employment Court.

The allegations and conflicting accounts between two individuals are as follows:

1. **Ms C** - During a dinner attended by all crew, who were seated at a small table, Mr H "*briefly almost stroked my leg*".

**Mr H** - stated that he was unaware if he had stroked Ms C's leg, but conceded that because six adults were seated at a small table, this may have occurred accidentally.

2. **Ms C** - During a conversation around the swimming pool Ms C told Mr H that she was tempted to go for a swim in the pool later that day. Ms C stated that Mr H responded by stating "*that will be something to look forward to*" which she later stated indicated sexual intent on Mr H's behalf.

**Mr H** - stated that his comment had been taken out of context because he had responded to what he thought was a joke made by Ms C when she said "*if you hear a scream, that's me*".

3. **Ms C** - stated that Mr H had knocked on her door and entered her hotel room. Ms C could not remember what Mr H had said at the time but stated that she had not invited Mr H to come into her room.

**Mr H** - stated that he had noticed that Ms C was not at the pool with the other 3 flight attendants and that he went to Ms C's room to check she was okay. He had knocked on her door and asked whether it was okay to come in and Ms C had said yes. He had then asked her if she was okay.

4. **Ms C** - was sitting on the bed and Mr H nudged her twice on the shoulder indicating he wanted to get on the bed.

**Mr H** - agreed this had happened and that this was out of habit as he did this at home with his teenage sons when he wanted to create some room on a couch for him to sit down and watch TV.

5. **Ms C** - stated that Mr H sat on the bed which led Ms C to move to the other side of the bed. Mr H had then got under a blanket, touched the inside of Ms C's upper leg, and then lifted the blanket indicating he wanted Ms C to come under the blanket with him. Mr H then touched Ms C on the inside of her upper leg for a second time, to which Ms C responded "*don't even try*".

**Mr H** - stated Ms C had not moved to the other side of the bed when he got on it, he had brushed his hand against her leg accidentally, he had not touched Ms C on the inside of the upper leg, nor lifted the blanket and said "*come in*", nor touched her on the inside of her upper leg for a second time as alleged.

After conducting an investigation into Ms C's claims representatives of A Ltd preferred Ms C's version of events and determined that Mr H's conduct amounted to sexual harassment and consequently dismissed him.

One of the central questions before the Court was whether Mr H's explanation was "*properly investigated and/or genuinely considered*". The Court stated that in relation to 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 review. What factors will assist in a particular case will depend on the circumstances, but may involve a consideration of such issues as:*

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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- 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."*

In this regard the Court noted that:

- Different practices were adopted with regard to the way in which information was recorded. Interviews with all people, other than Mr H, were not recorded or transcribed.
- Two significant interviews with Ms C and Mr B were conducted on the telephone which the Court considered did not facilitate the very careful questioning which was required and the assessment of credibility.
- When Ms C informed the other flight attendants as to what occurred they were "furious on her behalf" and became protective. In this regard the Court noted it was important for the investigator to consider carefully whether or not the account given by Ms C was influenced by the reaction of her colleagues. However on the evidence before the Court there was no evidence that this issue was raised with any of the other crew during the various interviews.
- The touching of the leg at the crew dinner and the inappropriate statement by Mr H about the pool, were not upheld as sexual harassment by A Ltd. However there was 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 these two complaints were not fully accepted.

The Court determined that during the investigation the inconsistencies between Ms C's various statements throughout the investigation were not put to her, nor was Mr H's explanation for his conduct. However against this Mr H was subject to a series of questions on all aspects of the matter that were put in a "penetrating and, at times, relentless fashion".

During the course of the Employment Court hearing it was submitted on the company's behalf that the company was not required to conduct a "formal judicial process" In response to this submission the Court held:

*"[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.*

*"[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."*

Employers therefore need to be extremely mindful of the way in which an investigation into conflicting statements is carried out; particularly in circumstances where a conclusion is reached to prefer the account of one individual which leads to the dismissal of the other.