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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

ISSUE 259

October 2016

Employment Court's Expectations Too Stringent

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- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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- Training
- Monthly newsletter

In issue 241 of The Advocate, we referred to a forthcoming Court of Appeal case ***A Ltd v. H*** that was to consider whether the Employment Court, in examining an employer's investigation into a serious misconduct allegation, had imposed a standard of inquiry which was too stringent and which bordered on the equivalent of a judicial investigation.

The Court of Appeal has now heard that case, and has indeed confirmed that the Employment Court was wrong in law when it held that the employer's investigation was not sufficient.

The Facts

Mr H was a 51 year old pilot on a tour of duty with a number of flight crew including Ms C, who was 19 years old.

The crew had a two night layover prior to returning to New Zealand, and during that layover it was alleged that several incident occurred. On the first night, at dinner, Ms C felt that Mr H "*briefly almost stroked*" her leg under the table. Mr H could not recall having done so but said it could have occurred accidentally due to the small size of the table and the number of people at the table.

On the second day, Mr H and three flight attendants were talking by the pool. Ms C said she was tempted to go for a swim and Mr H said "*that might be something to look forward to*". Mr H later explained that the comment was taken out of context.

Later that afternoon, Ms C said that Mr H came to her hotel room, sat on her bed, got under the blanket and reached across and touched her thigh in a sexual manner. Mr H stated that he had gone to the room to enquire as to Ms C's welfare. He said he went over to the bed and nudged her twice on the shoulder to indicate she should move over to make room for him. He said he initially sat on the blanket, then adjusted it. While repositioning himself he accidentally brushed Ms C's leg.

Ms C subsequently told other staff (including Captain B, the other pilot) what had happened, and then filed a formal complaint. After an investigation conducted by Mr Pearce, A Ltd concluded that Mr H had contravened the airline's sexual harassment policy and he was dismissed.

The Employment Relations Authority upheld Mr H's dismissal, however on appeal the Employment Court overturned that finding and reinstated Mr H. The Court held that the company had not considered the allegations in a "*even-handed*" manner, had tested Mr H's account rigorously and not Ms C's account, and held there had been significant breaches of natural justice. The Court also found there was disparity of treatment, as a pilot had not been dismissed on the basis of similar complaints back in 2009.

In reaching its view, the Employment Court considered four factors. It was concerned about how the evidence was recorded, as only Mr H's evidence was recorded and transcribed, the other witnessed only had notes taken; the Court considered that the other Pilot and Ms C weren't sufficiently questioned; it felt that insufficient consideration was given to whether Ms C's account as influenced by the protective reaction of her colleagues; and finally the fact that Mr Pearce had not treated the two earlier incidents at dinner and around the pool as sexual conduct.

The Court of Appeal considered the effect of s.103A of the Act, regarding what a fair and reasonable employer '*could*' do in the circumstances and said:

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

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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[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 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."

In the result, the case was referred back to the Employment Court:

"[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. 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."

So it appears that there are further instalments in this saga, in terms of the Employment Court reconsidering its own decision, and the fact of further allegations against Mr H being tabled. Watch this space . . .