IN THE COURT OF APPEAL OF NEW ZEALAND

CA243/2011
[2011] NZCA 488

BETWEEN	AIR NELSON LIMITED Applicant
AND	C Respondent

Hearing: 13 September 2011

Court: O'Regan, Harrison and Stevens JJ

Counsel: A H Waalkens QC and K M Thompson for Applicant
J Haigh QC and R McCabe for Respondent

Judgment: 23 September 2011 at 3.30 pm

Reissued: 29 September 2011: see Minute of 29 September 2011

Effective date of judgment: 23 September 2011

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Air Nelson Limited must pay costs to C on a standard application for leave to appeal basis together with usual disbursements. We certify for one counsel.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] In 2008 Air Nelson Ltd (ANL) dismissed one of its pilots, the respondent (C), for serious misconduct. The Employment Relations Authority (the Authority) found

that C's dismissal was justified.[1] The Employment Court later reversed that decision and ordered that C be reinstated.[2] ANL applies for leave to appeal against that decision.

[2] In order to obtain leave, ANL must identify a question of law that by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision.[3]

[3] ANL has identified three possible questions of law. Before addressing them, we will summarise the relevant background.

Background

[4] ANL is a regional airline which employed C as a pilot on its Dash 8 aircraft. In May 2008 an aeroplane under C's command was forced to spend an unscheduled overnight stop at Napier. C's fellow crew members were a male first officer (FO) and a female flight attendant (FA). She was then aged 19 years. All three were rostered to perform flight duties the next morning.

[5] The crew arranged overnight hotel accommodation. They stopped at a supermarket on the way. Before entering, they took deliberate steps to conceal their uniform insignia which would identify them as ANL employees. They purchased four bottles of wine and six 330 ml bottles of beer. After arriving at the hotel, the crew members changed from their uniforms into robes supplied by the hotel. By pre-arrangement they met later in C's room for drinks.

[6] 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

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1 *C v AC Ltd* ERA Auckland AA6/10 5272220, 13 January 2010.
2 *C v Air Nelson Limited* [2011] NZEmpC 27.
3 Employment Relations Act 2000, s 214(3).

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.

[7] 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.

[8] 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.

[9] 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.

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

[11] ANL commenced an internal investigation into C's conduct in June 2008 conducted by John Hambleton, its General Manager. He submitted comprehensive reports on his investigations. He concluded that C was guilty of serious misconduct in relation both to the purchase and subsequent consumption of alcohol and his sexual harassment of FA by unwelcome sexual activity including sexual intercourse. Subsequently, in June 2009, ANL dismissed C from its employment. C then made a personal grievance claim against ANL for unjustifiable dismissal. He sought

reinstatement. In a decision delivered on 13 January 2010, the Authority dismissed C's application.

[12] C then appealed to the Employment Court. On 29 March 2011, following a four day hearing in July and August 2010, Judge Perkins delivered a reserved decision. He reversed the Authority's decision. He found that ANL's internal investigation was fundamentally flawed. He ordered ANL to reinstate C.

[13] We will now consider each of the three questions of law identified by ANL.

(a) Test of justification under s 103A

[14] The first question of law identified by ANL is whether the test of justification under s 103A of the Employment Relations Act 2000 (the Act) required the Court to assess the employer's investigation as to whether that investigation revealed conduct capable of being regarded as serious conduct and whether the Court correctly applied this test.

[15] Section 103A provided:[4]

> **103A Test of justification**
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> 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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[16] Mr Waalkens QC for ANL submits that the Employment Court's inquiry on appeal under s 103A must be confined 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. He submits that s 103A precludes the court from considering events afresh or reaching its own view of the facts.

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[4] Section 103A was amended by s 15 of the Employment Relations Amendment Act 2010 with effect from 1 April 2011.

[17] Mr Waalkens says that Judge Perkins misstated or misapplied the test of justification and that he failed to reasonably review ANL's investigation. Instead, he says, the Judge conducted his own inquiry by way of redetermination of the underlying facts and reached his own findings upon them. Further, he says, the Judge misapplied the test of justification by requiring ANL to prove C's serious misconduct to a standard of proof which was unwarranted; by conflating the second part of s 103A with the first part; and by taking into account ANL's alleged disparity of treatment between C and FO who was not dismissed.

[18] We are not satisfied that an arguable question of law arises from the Judge's application of s 103A. His approach is summarised in these passages from his decision:[5]

> ... It is clear from those decisions that [counsel for ANL] is correct 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 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, as [counsel for ANL] has correctly submitted, 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.
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> ...
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> 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.

[19] 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.

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5 At [48] and [51].

[20] 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 appeal right under s 214 is limited in the manner described at [2] above and matters of fact are not amenable to appeal to this Court. The Judge's views on the facts must therefore stand. We are not satisfied that the Judge made any error of law that could be the subject of an appeal to this Court in undertaking his factual evaluation.

(b) Legal principles relating to sexual harassment

[21] The second question of law identified by ANL is whether the Court correctly applied the legal principles applicable to a concern of sexual harassment in all the circumstances of this case.

[22] Mr Waalkens submits that Judge Perkins misdirected himself as to the consent element of the allegation of sexual harassment. The Judge found that FA had brought the situation upon herself when concluding that she followed a premeditated course of seducing C into having sexual intercourse with her.[6] Mr Waalkens submits that in concluding that there was insufficient evidence of sexual harassment the Judge failed to consider whether FA was in all the circumstances subjected to unwelcome or offensive behaviour and in reaching an affirmative conclusion took into account FA's sexual experience or reputation.

[23] We agree with Mr Haigh QC for C that Mr Waalkens has taken the Judge's comments out of legal context. 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

6 At [54].

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.

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

(c) ANL's statutory and regulatory responsibilities

[25] The third question of law identified by ANL is whether the Court 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 pilot-in-command is practicable.

[26] Mr Waalkens submits that when ordering ANL to reinstate C the Court misdirected itself by failing to take into account ANL's statutory and regulatory responsibilities. Mr Waalkens concedes that the Court was required to direct reinstatement if that was practicable.[7] He submits, however, that airline pilots are engaged in safety sensitive activities which impose legal duties on ANL for determining whether a pilot is suitable to carry out work of this nature. He says that compliance with the Court's order for reinstatement puts ANL in conflict with its statutory and regulatory responsibilities because of its belief that C is not suitable to resume his duties.

[27] 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.[8] 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

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7 Employment Relations Act, s 125(2).

8 See at [71].

impaired. The Judge concluded that this evidence was exaggerated.[9] Again, that was a purely factual determination.

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

Result

[29] ANL's application for leave to appeal is dismissed.

[30] ANL must pay costs to C on a standard application for leave to appeal basis together with usual disbursements. We certify for one counsel.

[31] We note that the Judge made an order permanently prohibiting publication of C's name.

Solicitors:
G L Norton, Company Solicitor, Nelson for Applicant

[9] At [71].