

Upholding of man's dismissal for sexual harassment sends strong message – and emphasizes importance of context

The Court of Appeal's decision to uphold the dismissal of a 51-year-old airline pilot for sexual harassment because of the "inherent implausibility" of an innocent purpose and accidental touching in all the circumstances provides helpful guidance that will aid employers in deciding whether serious misconduct has occurred justifying dismissal, whilst cautioning employers that the requirements of procedural fairness may vary depending on the circumstances.

This decision (*A Ltd v H* [2016] NZCA 419) shows that while circumstances may require the employer to challenge the complainant in a more rigorous manner than was the case here in order to meet the requirements of section 103A(3) of the Employment Relations Act 2000 (or more particularly the requirement genuinely to consider the employee's explanation (if any) (s103A(3)(d), ERA)), they are also entitled to confront and correct inappropriate behaviour and protect victims of sexual harassment as circumstances dictate.

In reversing the Employment Court decision, the Court of Appeal rejected a number of criticisms the Judge had of the employer's investigative process. The Judge had, for example, criticised the employer for not recording and transcribing interviews with witnesses other than Mr H the pilot the subject of the allegations; for "insufficient questioning" of the complainant, a 19-year-old novice flight attendant, and Captain B; for insufficient consideration of whether or not Ms C's account of events might have been influenced by the way her colleagues rallied in support of her; and for not treating earlier episodes of questionable conduct by Mr H towards Ms C as being sexual in nature – and presumably therefore as somehow inconsistent with the employer's finding H had seriously misconducted himself.

"Obviously...it cannot be problematic in a legal sense if the Judge's references to even-handedness mean adopting a balanced approach" – but the Court held the position was otherwise to the extent the Judge was saying that "*invariably the requirements in relation to the questioning of each witness is to be the same.*" The Court went on to hold that the Judge had indeed gone too far and effectively proceeded on the basis that there was a rule requiring all witnesses to be questioned in the same way and to the same level of detail.

Thus, the Judge's orientation toward rule-bound decision-making fitted poorly with the flexibility, objectivity, and intensely factual nature of the contextual approach required by the test of justification under section 103A of the ERA: requiring, as it does, a case by case assessment of whether the employer acted as a fair and reasonable employer could (not 'would') have in the circumstances.

Context is everything

Ellen France P, writing for the Court, found the circumstances were "*all important*". Faced with a situation of a 51-year-old man entering the hotel room of a 19-year-old novice flight attendant, whom he had never met prior to the trip, and sitting on her bed under a blanket, when there were chairs he could have sat in, and it being accepted touching had occurred, the employer was entitled to structure his approach around the "*inherent implausibility*" of Mr H having had an innocent purpose and the touching being accidental.

But importantly, the Court of Appeal sounded a cautionary note, accepting that "*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 if s 103A(3)(d) of genuine consideration of the employee's explanations.*" In other words, context is everything and so employers ought not to jump to conclusions and must still be aware of the rights of the person accused of sexual harassment which also need to be protected – otherwise they could risk a finding of unjustified dismissal and face the potentially significant financial consequences that go along with such a finding.

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