Employment Court of New Zealand

C v Air Nelson Limited [2011] NZEmpC 27 (29 March 2011)

Last Updated: 1 April 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 27

ARC 7/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN C Plaintiff

AND AIR NELSON LIMITED Defendant

Hearing: 12-14 July and 25 August 2010 (Heard at Auckland)

Counsel: John Haigh QC and Richard McCabe, counsel for plaintiff

Christopher Toogood QC and Kevin Thompson, counsel for defendant

Judgment: 29 March 2011

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff (C) was dismissed from his employment with the defendant Air Nelson Limited (ANL) on 25 June 2009. At the time, C was an airline pilot captain employed by the defendant airline. The dismissal followed an inquiry made by ANL into C's behaviour while on an unplanned overnight stopover in Napier on 20 May

2008. During the course of the inquiry, C was originally stood down from flying duties and later suspended. The inquiry and the dismissal were carried out by the then General Manager of ANL, Mr John Hambleton.

[2] Following the dismissal, C raised a personal grievance. This was unresolved between the parties. In August 2009, C made an unsuccessful application to the

Employment Relations Authority for interim reinstatement.

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[3] As a result of the personal grievance being unresolved C, made an application to the Authority claiming that his dismissal was unjustifiable and that he had been unjustifiably disadvantaged by his suspension from flying duties during the course of ANL's investigation.

[4] The grievance in respect of the suspension was not pursued at the investigation by the Authority as a separate grievance. The plaintiff sought the primary remedy of reinstatement for the dismissal. The Authority held that there was no sustainable personal grievance arising from the dismissal. For the sake of clarity it made a similar finding in respect of the grievance lodged for the suspension contained in the statement of problem but not actually pursued at the investigation.

[5] The determination was issued on 13 January 2010.[1] On 3 February 2010, C filed a challenge to the determination seeking a hearing de novo. He elected to challenge the whole of the determination. The claim before the Court now pursues a grievance only in respect of the dismissal and seeks remedies of reinstatement, reimbursement of lost wages, compensation

for humiliation, indignity and injury to feelings, compensation for loss of benefits and costs.

Uncontested factual background

[6] The plaintiff was captain on the defendant's aircraft due to fly out of Napier on the evening of 20 May 2008. The crew of the aircraft consisted of C, a male first officer (FO) and a female flight attendant (FA), who was aged 19 years at the time. While the aircraft was on the runway, the airport became enshrouded in mist and the flight could not commence. The aircraft then taxied back to the terminal and repositioned for the night. The passengers disembarked and the crew made arrangements for an overnight stay at a local hotel. They had consumed an amount of food prior to the aborted departure.

[7] On their taxi journey to the hotel, C and FO asked the driver to stop at a local supermarket. The three crew members went into the supermarket and purchased four bottles of wine and six 330 millilitre bottles of beer. C and FO shared the cost

of the purchase of the alcohol equally. FA did not have any money with her and was not called upon to contribute. Prior to entering the supermarket from the taxi the pilots left their hats in the vehicle and covered their uniforms with their overcoats. FA took off her identification tag and her name badge. They were careful to ensure that their uniforms could not be identified by anyone in the supermarket.

[8] Once the wine and beer were purchased, the trio proceeded to the hotel and checked in. As they were without overnight clothes, C arranged for the hotel to deliver robes to the three rooms they occupied. It was agreed that the three, once they had changed into the robes, would then meet in C's room for a drink and nibbles. The three rooms were adjacent to each other. There was a connecting door between the room occupied by C and the room occupied by FO. The three met in C's room wearing the robes over their underwear. What transpired that evening and in the early hours of the next morning became the subject of a police inquiry into complaints made by FA and a separate inquiry by ANL into allegations of serious misconduct.

The company inquiry

[9] There is substantial evidence by way of a document trail establishing the steps taken by the employer to investigate the matter. The initial attempts by ANL to interview C and FO were delayed by the fact that a police inquiry was being undertaken into the complaints to the police. Once the pilots' union deflected the company's inquiries by invoking the right to silence, matters settled down. The periodic correspondence from the Human Resources Manager of ANL attempting to call meetings for interviews, while premature, indicated the initial emphasis of the company on allegations of inappropriate purchase and consumption of alcohol. As matters progressed, ANL raised further heads of issues as subjects of inquiry and they were notified to the pilots. FA, who was also subject to investigation for her behaviour on the night in question, was notified of the issues involving her.

[10] Once the police inquiry was completed, and it was decided that no charges would be laid against either C or FO, statements were prepared by them to be provided to ANL. FA had also provided statements but it is unclear exactly how

ANL's inquiry into FA's conduct proceeded. However, the inquiry into C's and FO's conduct involved the presentation of their statements at a meeting convened for that purpose. What Mr Hambleton, therefore, had before him in conducting the inquiry were the statements from C, FO and FA. Those statements contained the evidence from the participants upon which Mr Hambleton needed to make his decision as to whether there had been serious misconduct and, if so, what disciplinary action would be taken.

[11] Obviously, there had been considerable delay between the occurrence of the hotel room incidents and the statements becoming available to Mr Hambleton. This delay was not unreasonable. It was clear that C (and, for that matter, FO), acting on advice from his union and legal advisers, during the early and middle stages of this process, would have been extremely careful in what he said. He was the subject of police inquiry and could have faced a very serious charge of sexual violation. Once that was eventually considered by the police to be without foundation, he became subject to discipline by his employer. His career as a professional pilot was at stake. It is a matter of record that the relationship between the airline and the pilots' union involved in this dispute is virtually always conducted on an aggressively adversarial basis. The Authority Member referred to that in his determination. The documentary and other evidence produced shows that this dispute was no different from the norm. As Mr Haigh, counsel for C, mentioned in his submissions, the official reports of this Court are littered with outcomes of litigation between pilots or their professional association/union, and the employer airlines. That history, in turn, has some significance in my findings on one aspect of ANL's criticism of C throughout the process, upon which I shall elaborate later in this decision.

[12] Counsel agreed at the outset of the hearing that the folders of documents, which include the statements provided to ANL by C, FO and FA as part of the disciplinary process, are to be regarded as evidence in this matter. That is necessary to enable the Court to judge the actions of the employer during the disciplinary process. C and FO made one statement each. Both were disclosed to ANL during its inquiry. FA made two statements on the same day to the airline. That is explained by the fact that her father was present when the first statement was being taken and she was embarrassed to reveal all of the circumstances in front of him. The second

statement elaborates on the matters contained in the first statement. So far as C is concerned, he and FO, as part of the police inquiry arising out of the circumstances, also made statements to the police. I was informed by counsel that these statements were not inconsistent with the statements they made to ANL.

[13] In respect of the statements to the police, FA later took a curious stand during the employment inquiry by Mr Hambleton into the conduct of C and FO. She initially refused to agree to her own statement being provided to the company until after the company had decided not to discipline her. She then refused to agree to the statements C and FO had made to the police being provided to the company. No reason was given for that at any stage during the course of evidence. FA's own evidence under cross-examination on this issue was completely unconvincing. Of course Mr Hambleton was aware of her attitude at the time of his own investigation and would have needed to have taken cognisance of it in making his decisions. It is inexplicable that the police should have regarded FA as having a right to veto the statements of C and FO to the police being provided either to the company or their own legal advisers.

[14] The primary information, therefore, which Mr Hambleton had before him was contained in the statements that he had received from C, FO and FA. The following paragraphs set out the pertinent information that was provided to him in those documents.

[15] So far as the events before arrival at the hotel were concerned, C stated to Mr Hambleton that there had been some banter of a smutty, sexual nature between the three as they travelled from the airport. FO stated to Mr Hambleton that this type of conversation continued as they were drinking in C's room. FA made no comment to Mr Hambleton about this although an inference confirming it could be taken from some comments in her statements. Both C and FO told Mr Hambleton that at some point FA went uninvited to C's bed and lay on it next to him. She then invited FO to join them. FA claimed to Mr Hambleton to have no recollection of this. In his evidence FO stated that FA, during the conversation taking place on the bed, said words to the effect that it did not matter to her if she was having sex with a married man and she said that she had slept with two first officers in the company already.

While the three of them were lying on the bed and watching television some consensual spanking of FA took place by FO when FA exposed her breasts and belly, apparently to display her body-piercing that had been the subject of conversation between them.

[16] C, FO and FA all confirmed to Mr Hambleton that the drinking of the alcohol stopped at 11.30 pm as that was necessary to comply with the eight hour alcohol free lead-in time to FO's recommencement of duties at 7.30 am the following day. C and FA were also to report to the airport at that time so that they could take the same flight and reposition to Auckland in preparation for their next periods of duty later in the day. This repositioning was to take place during their own time.

[17] Prior to the events on the bed, the three had ordered breakfast for the morning and FA had hung the orders on the external door handles to the rooms. For some inexplicable reason FA had ordered two breakfasts for herself.

[18] By the time FO decided to leave C's room and go to bed, FA was under the covers of C's bed. FO believed that she was still clothed in her underclothing and the robe. He said in evidence that at that point she was conscious and smiling at him suggestively. He returned to his own room via the door adjoining his room with C's room. He stated that he watched television for a while and then fell asleep. He believed that it was approximately 12.30 am when all three of them went to bed. FO remembered that at some later stage the door between his room and C's room was closed.

[19] By the time the three of them had gone to bed, they had consumed the six bottles of beer and two bottles of the wine. Some of the wine had already been tipped out by that stage. The rest was tipped out by FO in the morning. The equivalent of two bottles of wine was disposed of. The evidence of both pilots is that the consumption of alcohol took place between 10 pm and 11.30 pm.

[20] The smutty language, the spanking on the bed and FA exposing herself is contained in the evidence of both C and FO with each corroborating the other. They also corroborate each other as to the quantity of alcohol they consumed. FA claimed

later that she could not remember anything after midnight until she awoke at

4.00 am. In her statements earlier and during her evidence she claimed to have no memory of the incidents clearly occurring on the bed before midnight. She claimed to have no recollection of the quantity of alcohol she consumed.

[21] In order to continue the narrative of events placed before Mr Hambleton I set out most of the statement of C as written, despite its unsavoury nature. I also set out portions of the statements from FA to illustrate the fact that FA was unable to dispute most of the assertions of C placed before Mr Hambleton, which were also partly corroborated by FO. I shall commence the narrative of C at the time that he says FA came and lay on his bed:

11. We had been talking all night. A lot of smutty talk as was fairly usual for [FA] and her friend [K]. We talked about other F/As and pilots. She said she had had sex with at least one F/o and led us to believe that she may have had sex with another as well but wouldn't say who. We were trying to guess, [M] and [P] were the 2 in question. She talked about having sex with no

strings attached, just sex and said that was the same for married men when we asked more.

12. Then she came and lay next to me on the bed. We were watching Underbelly on the TV. There was a tattooed man on the TV and we asked if anybody had tattoos. She showed her pierced belly-button. We asked if she had anymore piercings. We talked of [N] who has a pierced Clitoris and had shown a few of the boys before. [FA] said that she used to have a pierced nipple and showed her breasts. I said I reckoned that she was lying because the pierced nipples I had seen before the nipple was quite pronounced. We talked of [T] and [K] as to 2 other F/As that had pierced nipples.

13. We talked about her being called ... and that got onto the topic of waxing rather than shaving but she shaved as when you wax you have to let the hair grow before you wax so shaving was easier to maintain.

14. She asked [FO] to come over and join the spoon with her in the middle. He did but only for a short time. As he was sitting on the side of the bed her left thigh was exposed. She asked [FO] to spank it. She pulled her underpants right up to expose more thigh and egged [FO] on to do it again. She turned over and slapped my chest

3 times quite hard, leaving a mark. It spilled my wine on both my and her robes, and exposed my tattoo. It had been showing anyway

as the robe was very small on me.

15. She got up and went to the toilet and while she was out I got under the covers as it was easier rather than keeping myself covered on top

of the bed. She came back and we continued talking and she lay back next to me really close still in the spooning position.

16. After Underbelly finished at about 1215 we decided to call it a night. [FA] got under the covers in my bed next to me in the spoon position while [FO] was still in the room. [FO] took the last of the pretzels and went to close the door. [FA] said to turn out the light and pointed to the one by the door just as [FO] closed the door and said catch you in the morning.

To this point in C's statement, the statement which Mr Hambleton had from FO

corroborated C in all material respects. As indicated, FO said he left the room at

12.15 am with C and FA in the bed together. C then continued the narrative as follows:

I took off my robe and was still in my undies and [FA] was still in her robe.

I didn't spoon her, I was just on my side of the bed, not touching.

[22] C then set out in graphic detail the act of sexual intercourse, which took place. After he awoke at 4.00 am he found FA still in his bed and by this time fully naked. She was attempting to arouse him sexually and from his account, it was clear that she initiated the sexual intercourse, which followed. He then continued the narrative as follows:

20. ... She got up and put on her robe, she said she would be back in a minute and had a smile on her face. She left my room and I heard her go into her room. I remember seeing the clock at 428.

21. I went back to sleep and woke again when the alarm went off at 630.

I got up and had a shower. When I had my shower I noticed something rolled up in toilet paper in the rubbish bin. I wondered

what it was and when I looked it was a tampon. It was relatively clean.

22. After my shower, at 645 I rang her room to make sure she was up and getting ready. [FO] had already opened the connecting door to my room. He laughed because [FA's] bra and knickers were on the floor next to her side of the bed. I didn't know they were there as I hadn't been around that side of the bed. I picked them up and put them on the counter. I thought that she must be up and in the shower. At 7 I heard room service coming down the hall with breakfast. I heard her knock next door so opened my door as I would be next. The lady said there was no answer and that 2 Big Breakfasts had been ordered for [FA's] room. I couldn't understand as to why 2 had been ordered. She brought in mine and [FO's] breakfasts, and I asked her if she had a key to get in so I could check to see if everything was ok. She said that only the manager downstairs had the key. I got [FO] to try her phone to ring her room

and went outside her door to see if I could hear her phone ring and I

could.

[23] In her first statement, when her father was present, all FA said concerning the events described by C was:

> 21. ... From midnight I can't remember anything and at about 4:30 a.m.
>
> I woke and I was in [C's] room. I went to my room and phoned [K]
>
> and [J] came to the hotel and picked me up.

Her first statement, therefore, was not in conflict with the statements of C and FO, although she differed as to the timing of the drinking period, which she said commenced at 9.00 pm.

[24] In her second statement, she elaborated. Commencing with paragraph 5, she stated:

> 5. What happened in [C's] hotel room by way of drinking the wine and
>
> the beer is, as best I can recall, set out in my first statement.
>
> 6. While I was in [C's] room I was texting my friend [K]. [K's] last text to me was at about 11.30 p.m. I do not recall having anything to drink after this time but I cannot be exact as to how much I had drunk by this time because both [C] and [FO] were topping up my glass. I believe that in addition to the two beers I had had earlier, I drank about two to three glasses of wine.
>
> 7. I do remember thinking though that there was no way that I could have too much to drink because I had to work the next day.
>
> 8. I also remember at about this time going back to my room to get my other phone. I use one phone for my friends and another phone for family and work. When I went back to my room I used the toilet but did not change my tampon. I still had the bathrobe on along with my bra and underwear when I went back into [C's] hotel room. I sat down in the same place I had been sitting before. [FO] and [C] were both still in the room and my glass of wine was where I had left it, still about half full.
>
> 9. After this time, I do not remember anything over the next four hours or so.
>
> 10. My next memory was standing inside [C's] room by the entrance door. I still had my bathrobe on but nothing else. My bra and underwear were gone. The lights and TV were turned off. [C] was awake, or woke up, and asked me where I was going and I told him I was going back to my room. I had my keys with me and both of my cellphones.
>
> 11. Although I had my keys and phones with me, I could not remember picking them up and I have no memory of putting on my bathrobe or for that matter, having taken it off.
>
> 12. I went back to my room. As soon as I got there I started crying. I felt really dirty and disgusted. It felt to me like I had had sex but I could not remember it. I had my period at the time and I remember thinking that [C] was a married man with children and there was no way that I would have willingly had sex with him.
>
> 13. I did not seem to have any physical injuries but I was really distressed and upset and did not know what I should do. I rang my friend [K] and told her that something really bad had just happened and I felt really dirty and disgusting. This was about 4.30 a.m.

[25] From that point on, FA described having a shower and leaving the hotel with the assistance of another employee of the airline. She stated to Mr Hambleton that she had discovered while showering in her room that her tampon was missing. Mr Hambleton was informed by FA and the witnesses who gave statements to ANL and who saw her or whom she contacted, that she was in a very distraught state. The witnesses recorded that she still appeared to be under the influence of alcohol. The final paragraph of FA's statement is as follows:

> 29. Although I have no memory of what actually occurred between midnight and 4.30 a.m., I feel certain that someone had sex with me. The thought that either [C] or [FO] may have been involved disgusts me. I would find it impossible to believe that I had agreed to have sex. This is not only because of who [C] and [FO] are and their personal circumstances but physically, I was having my period at the time.

A complaint of alleged sexual offending against both C and FO was then laid with the police. Later, a complaint of sexual harassment was made to ANL by FA against C.

[26] Whereas initially the inquiry into C's conduct centred on the issue of the alcohol purchase and consumption, by the time the pilots agreed to be interviewed by ANL, there were four issues being considered:

(a) Those arising from the purchase of the alcohol and its consumption at the company provided hotel;

(b) whether C was in breach of company policies in relation to the consumption of alcohol and, in particular, leading into the next rostered period of duty;

(c) whether C had breached company policies in relation to sexual harassment; and

(d) whether C's behaviour and conduct breached the standards of conduct

and behaviour expected of an airline captain.

[27] These four issues had been spelled out in varying ways in the correspondence leading up to the formal stages of the disciplinary process. The pilots and FA had in the meantime been suspended on pay. As I have indicated, no issue arises out of that suspension in these proceedings.

[28] Mr Toogood, counsel for the defendant, in written submissions, has outlined in detail, with appropriate reference to documents and correspondence, the stages of the process adopted by the company. I perceive the focus of this challenge is on the substance of issues used to dismiss C and not procedural defects in the process. I do not, therefore, intend to completely re-traverse the process of the inquiry leading to the ultimate decisions. The company carried out thorough inquiries. It held interviews at appropriate times and allowed C, FO and FA more than adequate opportunities to present their responses. C and FO were well represented by legal advisers provided by their professional association/union. Mr Toogood in his final submissions responded to irregularities raised somewhat tentatively by C during the course of these proceedings. They are that the outcome of the disciplinary action was predetermined, that ANL had failed to disclose information held by it, that ANL did not seek information within an appropriate timeframe, and ANL's investigation team was biased against C. They did not seem to be regarded as primary points by Mr Haigh in his submissions although pressed nevertheless. This was a difficult, quite complicated, and time consuming inquiry for all parties involved. There is insufficient evidence to show that there was predetermination or any bias against C for his involvement in his union's activities and industrial negotiations with ANL. Nevertheless, I consider that Mr Hambleton did not approach the inquiry with an

open mind. As Mr Haigh submitted, the two pilots and FA had exemplary employment records. I found it surprising, therefore, that on two occasions Mr Hambleton refused to concede this in his evidence. When Mr Haigh put to him that C had an exemplary record, Mr Hambleton would only agree that it was "clear" or it was "satisfactory". Without further elaboration, that seemed a somewhat ungracious response and somewhat difficult to fathom. I have decided that this attitude on Mr Hambleton's part could not be as a result of the history between C and him so far as the industrial negotiations were concerned. However, it does indicate that from the outset Mr Hambleton approached the inquiry with a closed mind, which influenced his final decision to dismiss C. There were other examples of this, which arise from Mr Hambleton's report and findings that I shall be discussing in this judgment.

[29] Once the inquiries and interviews were complete, Mr Hambleton prepared comprehensive reports on his findings. He provided copies to the pilots and allowed further representations on the disciplinary action being considered. The reports were undated but it seems clear that they were completed about May 2009 and were the subject of the meeting on 25 May 2009 between the company representatives, C and FO, and the union representatives. By this stage, FA's behaviour had been the subject of a separate disciplinary inquiry by the company and she was no longer involved.

[30] This inquiry, from the time of the alleged offending behaviour on 20 May

2008 to the end of the disciplinary process, took over 12 months leading to C's dismissal on 25 June 2009. That period was understandable in view of the intervening matter of the police inquiry. It is also indicative of the careful approach adopted by C's advisers in what was an intricate and precarious process of employment discipline and alleged criminal offending.

The Hambleton reports following the inquiry

[31] In his reports following the inquiry into the conduct of C and FO, Mr Hambleton set out the background and other factors in a comprehensive way. I primarily concentrate on the report on C but it is also necessary to consider the report on FO to highlight the difference in the eventual disciplinary action taken between

the two of them. Mr Hambleton's findings are set out sequentially under the four headings I have mentioned followed by his conclusions from the inquiry. The first heading considered was the quantity of alcohol purchased and consumed and whether there was any lack of judgement on C's part. The second head was whether there had been a breach of company policies, operating manuals and/or code of conduct and the employment agreement in relation to purchase and consumption of alcohol. In his conclusions, he merges the two headings to some extent. He formed the view on the first head that the purchase and consumption of alcohol was "irresponsible and unacceptable in terms of the standards of behaviour the company could reasonably expect of a professional pilot."

[32] In reaching his conclusions under this head, Mr Hambleton deals with the motives for the purchase of the alcohol by C and FO. He made findings as to credibility so far as both were concerned. He expressed the view on credibility, somewhat

speculatively, that neither C nor FO was truthful about saying they intended to take some of the alcohol home with them or, if other crew were present at the hotel, providing it to them. There was some suggestion from Mr Hambleton when he gave evidence that FA may have questioned the quantity of alcohol purchased by C and FO while they were all at the supermarket. In her statement FA states that she was "thinking that the amount they had bought was a bit too much". From that it would appear that she did not actually make any statement to the pilots to that effect at the time. After being pressed during interrogation by ANL's Human Resources Manager during the inquiry into her own behaviour, she did state that she must have said something at the time. Having regard to the manner in which this was elicited, its reliability is suspect. She did not clarify this issue either in evidence-in-chief or under cross-examination at the hearing. It is clear, however, from the statements of C and FO that C did state at the supermarket he would contemplate taking any unfinished wine home with him. The point became an issue of credibility in Mr Hambleton's report and his evidence. The fact that it is more likely than not that C simply proffered the statement rather than responding to any criticism from FA is a matter, which should have enhanced C's credibility on this issue for Mr Hambleton.

[33] The finding under the second head is less conclusive. Mr Hambleton does not actually find that C breached any company policies, manuals, code of conduct or the employment agreement in respect of the consumption of alcohol and he does not transpose any such finding into his final conclusions in his report. He considered the eight hour rule. He had no conclusive evidence that C had breached those rules. He was faced with the lack of any evidence that C was at any time, including the critical period when the repositioning flight took place the following morning, influenced by alcohol. He had to accept C's own reporting on consumption and the time when he, FO and FA ceased drinking. Nevertheless, under this head he found C's actions were "irresponsible and unacceptable for a pilot with clear responsibilities." Curiously, when the findings under these two heads were then dealt with in Mr Hambleton's conclusion in his report, the focus then turns to C's oversight of FA's consumption of alcohol rather than any consequences on operational or safety requirements arising from C's consumption of alcohol as the second heading in the findings would seem to suggest. He also considered the evidence he had from Dr Tim Sprott relating to the doctor's assessment of FA's state of intoxication at the time. Dr Sprott is the Chief Medical Officer of ANL's parent company, Air New Zealand. Mr Hambleton extrapolated from Dr Sprott's findings, made primarily in respect of FA, the view that C and FO, like FA, had indulged in binge drinking. There is a certain level of speculation also in Mr Hambleton's findings, which involved the rejection of the assertions of both C and FO. This rejection was made without any evidence in support from FA, who we know refused to participate or comment on the explanations given by the pilots.

[34] The conclusions of Mr Hambleton then lead in his report into a consideration of the issue of sexual harassment and C's overall responsibilities as captain. In respect of the first two heads, Mr Hambleton's conclusion was that C's actions amounted to serious misconduct.

[35] In respect of the heading relating to the complaint of sexual harassment, Mr Hambleton rejected the description of events by C, even though corroborated in material ways by FO. He speculated that the act of sexual intercourse took place earlier than C says, that it was not instigated by FA, and that at the time of the events FA's consciousness and, therefore, recall were heavily affected by alcohol. He

formed these views because of FA's state of hysteria and anxiety as reported to him by her and the other employees who were initially contacted by her and in one case went to her assistance. The employee who went to her assistance stated that FA was incoherent and dazed and under the influence of alcohol. She described her as being very disturbed and distressed. Mr Hambleton's conclusion was that the sexual intercourse was unwelcome to FA and amounted to sexual harassment. That, in turn, amounted to serious misconduct. Mr Hambleton made a finding that he did not believe "the sexual activity that took place was consensual and welcome in the manner described by [C]". He was confronted with this in cross-examination at the hearing. He was unconvincing in his explanation for this finding. I gained the impression that Mr Hambleton continued at that time with his view that the sexual intercourse was not consensual and the inference must be that he regarded C as having raped FA even though he knew the police had formed the view that her complaint was without substance.

[36] Finally, there is the head of whether C had breached the standards expected of a captain. Under this head, Mr Hambleton considered the responsibilities of a captain under the Flight Operations and Quality Manual. He referred to example setting, being a role model, and overall responsibility for the crew. His conclusion under this head was that:

Through [C's] actions and his overall failure to discharge his responsibilities as a Captain, he has breached the trust and confidence that the company placed in him as a Captain to provide the appropriate leadership example on an overnight to ensure his crew are free of alcohol and fit for duty the following day and that their welfare is not compromised through excessive drinking and subsequent sexual harassment.

[37] In the ultimate paragraph of his report, he indicated that he needed to consider an appropriate outcome. It was made clear that the company was considering termination of employment but before coming to a final view it wished to receive final representations.

[38] In the report on FO, he adopted a similar format and wording. His ultimate conclusion on FO is significant and relevant to an issue that needs to be considered by me: that of whether there has been even-handed treatment between employees being disciplined for the same events. The conclusion in the report on FO states:

To conclude, I have formed a view that [FO's] actions in relation to purchase and personal consumption of alcohol were inappropriate and unacceptable in the circumstances. Further, as a responsible pilot with Civil Aviation obligations, [FO] was actively involved in [FA's] alcohol consumption. As a result of her alcohol consumption this would have compromised her ability to operate in a compliant manner. As a result I have formed a view that [FO's] actions amount to serious misconduct.

The Sprott/Shanahan evidence on alcohol consumption

[39] There is obviously conflict in the material presented to Mr Hambleton on the issue of alcohol consumption. The statements, which Mr Hambleton received from C, FO and FA were that they had each consumed two bottles of beer and two bottles of wine between them. In his reports under the heading "The Relevant Facts" Mr Hambleton accepted that this was the quantity of alcohol consumed that night. He accepted as a fact that the other two bottles of wine were not consumed but disposed of. He also had before him the result of the ESR analysis of FA's blood samples provided by her 14 hours after the drinking was said to have ceased. It was also common ground from the information provided by all three to Mr Hambleton that the drinking stopped at 11.30 pm. That was also confirmed by FA.

[40] I have already referred to the fact that Dr Sprott's evidence was relied upon by Mr Hambleton in his reports. On the basis of information supplied to Dr Sprott concerning the age, body weight, quantity of alcohol consumed, and period over which it was consumed, he was asked to estimate the likely blood-alcohol level and state of intoxication of FA. He used the Widmark model in his calculations. He was provided with the actual ESR result of FA's level of intoxication measured from the samples provided by her 14 hours after the drinking was said to have ceased. The ESR measurement at that time was 5 milligrams of alcohol per 100 millilitres of blood. Doctor Sprott estimated that at midnight on 20 May 2008, FA's levels would have been 158-186 milligrams of alcohol per 100 millilitres of blood. This, he said, compared favourably with the ESR estimates of 145-285 milligrams of alcohol per

100 millilitres of blood working back from the ESR blood alcohol result 14 hours after drinking was said to have ceased. These figures, however, represent wide discrepancies in each estimate by Dr Sprott and ESR between the lower and the higher levels and between each other, particularly at the higher levels. The assessment of 285 milligrams of alcohol per 100 millilitres of blood is of course an

enormous count for alcohol in the blood. It equates to 1425 on the breath scale used in traffic prosecutions. Even the amount of 186 equates to 903 on the breath scale. Both would indicate that FA had consumed a considerable quantity of alcohol. On the basis of the self-reporting, I have considerable qualms as to whether Mr Hambleton should have accepted the reliability of these estimates by ESR and Dr Sprott.

[41] Dr Sprott's interpretation of the estimates was that FA was intoxicated when drinking ceased or shortly thereafter. The reported drinking was consistent with binge drinking and represented a heavy consumption of alcohol over a short period of time. His final conclusion was that:

It is of very great concern that the cabin crew member concerned, and the two technical crew members, considered that drinking this amount of alcohol during a layover is acceptable behaviour and it has potential significant flight safety implications related not only to the intoxication effects of alcohol but also related dehydration, disruption of sleep patterns and fatigue.

[42] Mr Hambleton, in his report, as I have indicated, used Dr Sprott's evidence to find that as C and FO had reported having consumed similar quantities of alcohol to FA, they also would have indulged in binge drinking and may not have been alcohol free as required when reporting for duty the following morning. He concluded this amounted to a serious lack of judgement on the part of C and FO.

[43] In order to respond to these allegations, C's union employed Mr Rory Shanahan, forensic scientist and analytical chemist, to estimate, using comparable information to that supplied to Dr Sprott, the time when the blood alcohol concentrations of C and FO would be zero. It was predicated on the basis of the same or similar level of alcohol reported by FA to have been consumed by her. Heavier, more mature males would, in his estimation, eliminate alcohol at a faster rate than FA. His summary was as follows:

1. From the measured blood alcohol concentration of [FA] the amount of alcohol she consumed was estimated.

2. All three crew members had consumed the same amount of alcohol.

3. Using that amount of alcohol it was estimated that the blood alcohol concentration of [FO] would have been zero at a time between 3.45 am and 9.30 am, the most likely time being 5.30 am on 21/5/08.

His blood alcohol concentration would have been 20mg% at a time between 2.45 am and 7.30 am, the most likely time being 4.15 am.

4. Similarly, it was estimated that the blood alcohol concentration of [C] would have been zero between 3.00 am and 10.00 am, the most likely time being 4.45 am on 21/5/08.

His blood alcohol concentration would have been 20mg% at a time between 2.00 am and 6.15 am, the most likely time being 3.30 am.

[44] Mr Hambleton received a copy of Mr Shanahan's report. On 22 June 2009 he responded to the union's legal adviser's previously prepared submissions on his May report, which included the Shanahan opinion. In respect of that he replied:

The Shanahan report. I received this report on 18 June 2009. I understand the report to have been prepared on the initiative of [C] and/or his representatives. I have considered this report. I have taken from the report that there are a number of variables present in any analysis of this type. Mr Shanahan does in some respects use different base data relating for example to the amount of alcohol consumed, and uses an alcohol level that may be on the low side for red wine. However, irrespective of these factors, a major feature that I take from the Shanahan report is that analysis and assessment can depend on a number of variable factors. I believe that I have recognised this in my findings where, among other things, I formed a view that the level of alcohol consumed in a short timeframe, late in the evening, would have [led] to significantly elevated alcohol levels to the extent that [C] would not have been able to assess at the time he finished drinking that he would be alcohol free in the event that arrangements were changed and taking account of the report time the following morning. My view is that the opinions expressed in the Shanahan report do not cause me to alter the findings that I have made.

[45] Dr Sprott, of course, could only comment on the level of alcohol reported to have been consumed by C and FO. His analysis in so far as it related to FA also depended on variable factors. He did not make any calculations of the time when the blood alcohol content of C and FO would have been zero. Both the comments of Dr Sprott and the calculations of Mr Shanahan are also based on self reported levels of alcohol consumption by C and FO. That is not solely the case with FA where ESR analysis of an actual sample was available. However, I would have thought that Mr Hambleton's attempts to assess the levels of intoxication of C and FO in terms of blood alcohol content at the material time of the report for duty would have been considerably assisted by the findings of Mr Shanahan. Dr Sprott's report was ambiguous on a point apparently relied upon by Mr Hambleton in rejecting the calculations of Mr Shanahan. It is unclear whether Dr Sprott's comments as to binge drinking actually relate to FO as opposed solely to FA. The comment as to binge

drinking is made in the context of a discussion of FA's consumption of alcohol and may only relate to her. It should have been clear to Mr Hambleton that FA had probably consumed more than the pilots. That would appear to be the only explanation for the calculations of a substantial quantity of alcohol in her blood. Ultimately, Mr Hambleton appeared unwilling to consider the pilots' position on the basis of giving them the benefit of any existing doubts. He did not in his evidence state that he had referred Mr Shanahan's findings for comment to Dr Sprott. I presume he did not do so. I consider this would have been an appropriate course for him to take. He also undertook an investigation into the size of wine glasses provided by the hotel. In view of the fact that in his report there appears to be acceptance that two bottles of wine were consumed I have difficulty in assessing what possible assistance the glass size would have given him in his inquiries. His unwillingness to give weight to Mr Shanahan's findings and his unusual investigation into whether larger wine glasses may have been provided by the hotel are further examples of Mr Hambleton's closed-minded approach to the inquiry.

The disciplinary action taken

[46] Following the final meeting on 25 June 2009, C and FO were informed of the action to be taken. This was confirmed by Mr Hambleton in writing the following day. C was dismissed on 25 June 2009 on the basis of serious misconduct relating to alcohol, his responsibilities as a captain, and sexual harassment. FO received a final written warning. He was required, prior to returning to work after his suspension of

12 months, to undertake assessment as to alcohol issues. His eligibility for promotion to captain was to be deferred for 12 months. On 25 November 2008, following counselling, FA had been informed that no disciplinary action was to be taken against her. I heard in evidence that she had transferred from the position of flight attendant with ANL to a ground staff position with Air New Zealand.

Principles applying in the Court's review

[47] In his submissions as to the scope of the Court's inquiry, Mr Toogood

submitted that:

11. ... The issue is relevant to the extent to which the Court is entitled to undertake its own inquiry into the facts and come to different views from those reached by the employer's representative, Mr Hambleton, as to matters of fact in relation to the alleged misconduct (as distinct from conclusions as to outcome based on those facts).

12. The particular question at issue is whether it is appropriate for the Court to undertake any detailed examination of, and reach its own conclusions about, whatever actually happened in the hotel room and in the sexual encounter between [C] and [FA] with a view to determining whether the Court should accept [C's] or [FA's] account of those events.

13. The defendant submits that it would be wrong in principle and, therefore, that it is unnecessary, for the Court to make its

own inquiry into what actually happened on that night. The purpose of the inquiry in these proceedings is not to establish what actually happened, but to determine whether [ANL] has proved that Mr Hambleton (as the employer's representative) had reasonable grounds to believe, and did honestly believe, there had been misconduct by [C] of sufficient gravity to warrant dismissal.

14. By reason of s103A ERA, that belief must be tested against an objective consideration of 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 occurred.

15. If the Court determines that the employer carried out a full and fair inquiry, and that the employer had reasonable grounds to believe, and honestly did believe, in the findings of fact on which it relied in deciding to dismiss the plaintiff, it is not for the Court to displace those findings with its own. The role of the Authority or the Court under s103A in those circumstances is confined to determining whether the decision to dismiss is one which a fair and reasonable employer would have taken in all the circumstances (including the facts as reasonably found by the employer on the basis of a full and fair inquiry).

16. That this is a correct statement of the law is established by an analysis of the relevant cases, including those which preceded s103A but which contain the expressions of principle encapsulated by the section.

[48] Mr Toogood relied, in support of his submission, upon *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*,[2] *Air New Zealand Ltd v Hudson*,[3] *X v Auckland District Health Board*[4] and *Arthur D Riley & Co Ltd v Wood*.[5] It is clear from those decisions that Mr Toogood 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 Mr Toogood 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.

[49] It would, however, be illogical for the Court to not be able to consider the factual rationale for the employer's belief. The principles are, in my view, succinctly contained within the following statement by the Court of Appeal in the *Airline Stewards and Hostesses* case where at 993 the Court said:

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

And in the *Arthur D Riley* case this Court said at [52]:

Section 103A obliges the Court to take an objective approach to determining justification for dismissal. The process is essentially a review of the employer's decision to dismiss. ... The question is whether the employer was justified in his decision.

[50] Confirmation of the entire process, which the Court must undertake in that review, has been taken a stage further than was discussed in those cases referred to by Mr Toogood in his submissions. Curiously he did not refer to the case of *Air New Zealand Ltd v V*,[6] which was referred to in Mr Haigh's submissions. Nevertheless, it is helpful to set out the material passages from *V* which, incidentally, was not the subject of appeal from this Court. The decision gathers together the principles referred to by Mr Toogood from the decisions which followed the enactment of s

103A of the Employment Relations Act 2000 (the Act). The full Court stated in the following paragraphs:

[33] By reverting to the use of the word "would" s 103A imposes on the Authority or Court an obligation to judge the actions of the employer against the objective standard of a fair and reasonable employer. It is not the standards that the Authority or the Court might apply had they been in the employer's position but rather what these bodies conclude a fair and reasonable employer in the circumstances of the actual employer would have decided and how those decisions would have been made.

[34] The last aspect of s 103A, and the most important one in this particular case, is the use of the words "in all the circumstances at the time the dismissal or action occurred".

[35] In these words is the answer to Mr Toogood's submission that, once a finding of serious misconduct has been made, the Authority or Court can not review the employer's decision to dismiss.

[36] The requirement that the assessment of the employer's actions be conducted in light of the circumstances "at the time

the dismissal or action occurred" necessarily includes the dismissal or disadvantageous action itself. This is consistent with the opening words of the section which focus the test of justification of the dismissal or action said to be unjustifiable. To adopt the plaintiff's submissions would be to exclude from the ambit of s 103A the very thing to which the section must apply in a case such as this, that is the decision to dismiss. We conclude that the plain meaning of the words of s

103A encompasses not just the employer's inquiry and decision about whether misconduct has occurred and its seriousness, but also an inquiry into the employer's ultimate decision in the light of that finding.

[37] The meaning of the text of s 103A is clear on its face and in the light of its common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of an employer up to and including the decision to dismiss. The same test applies to justification in disadvantage grievances. Those actions are to be assessed against the test of what a fair and reasonable employer would have done in all the circumstances.

[51] 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.

Conclusions

[52] I deal with the four grounds on which the employer relied as the basis for finding serious misconduct and dismissal in turn. So far as the first and second issues of purchase and consumption of alcohol were concerned, there was technical evidence as to FA's consumption. Mr Hambleton undertook some curious methods of inquiry into consumption by C and FO. The steps he took to find whether the hotel had supplied larger sized wine glasses, in an effort to decide what quantity of alcohol the pilots had each consumed, with the greatest of respect to Mr Hambleton, was over-zealous. After all there were photographs taken of the room the following morning. Those photographs included the used wine glasses. Those photographs were available to Mr Hambleton during his inquiries. Looking at the position objectively, Mr Hambleton, if he was to find that the pilots had consumed excessive alcohol, needed to try to uncover more evidence than he had. This was because the findings of Dr Sprott, while conclusively showing that FA had consumed a great deal of alcohol (there was evidence of others as to her state at 5.00 am confirming that), could not be said to be conclusive as to the findings in respect of the pilots.

[53] It is for this reason that I find that Mr Hambleton should not have so readily dismissed the findings of the scientist Mr Shanahan that he had available to him prior to the ultimate decision. That evidence clearly showed that in the early hours of the morning the pilots would have been free of alcohol and that in turn should have led Mr Hambleton to find that they had not consumed excessive alcohol prior to 11.30 pm. The purchase of the four bottles of wine I consider to be somewhat of a red herring in this entire issue. Mr Hambleton appeared to want to believe that no matter what the explanation from the pilots was, they intended, along with FA, to consume all four bottles between the three of them and that was their intention from the outset. Why he placed importance on this and his rejection of their stated reasons for the purchase of the four bottles is hard to understand. He went to some lengths to attack the credibility of the pilots in rejecting their stated reasons for purchasing the four bottles from the supermarket. He seemed to consider that the alcohol purchase was unacceptable conduct but I fail to see why. In any event it was irrelevant to the overall question of the actual consumption of alcohol because there was clear and quite conclusive evidence before him that they did not consume more than two

bottles between the three of them. The balance of wine was disposed of by FO. In his report, Mr Hambleton has accepted in his findings of fact that the consumption was of the beer and two bottles of wine. It appears clear that FA consumed more alcohol on the evening than either of the two pilots did despite the self-reporting that they all consumed an equal amount. Whatever their exact consumption was, their alcohol free status prior to any required reporting time was confirmed by Mr Shanahan. That evidence was available to Mr Hambleton prior to the decision to dismiss C. In respect of these first two issues, I consider Mr Hambleton's decision on an objective basis was not a decision that a fair and reasonable employer would have reached in all the circumstances at the time of the dismissal.

[54] On the finding by Mr Hambleton that C sexually harassed FA, I find that Mr Hambleton did not have clear evidence upon which he could reasonably or safely rely in reaching that conclusion. He failed to rely upon the evidence, which was patently before him. Mr Hambleton preferred instead to speculate simply based on FA's state when she was still clearly under the influence of alcohol and for which state there could be other conclusions than those he reached. FA claimed to be unable to recall a great deal of the events of the night in question. Mr Hambleton had no evidence from her that she had previously suffered a memory loss, nor apparently since the events. She claimed in her evidence and in her statements that she did not drink alcohol to excess that night and yet it would have been clear to Mr Hambleton, from the scientific and medical analysis, that she did. Mr Hambleton's conclusions are not reasonable. He should have considered whether FA's alleged loss of memory was simply a convenient way to avoid confronting her own behaviour that night. There were three pieces of evidence before him from C, two of which were corroborated by FO, which should in his consideration have seriously

undermined FA's allegation of non-consensual sexual intercourse with C; for that is what she alleged by the complaint of rape against him. The first is that despite her allegation that she would not have had consensual sex with C because he was married, she had admitted a willingness to do that in the conversations on the bed the previous evening. The second is that when FO came into the room the following morning, he noticed FA's underclothing on the floor on the side of the bed where she had clearly slept. Thirdly, C states that he found her tampon neatly wrapped in toilet paper in the bathroom rubbish bin. FA confirmed in her statement to Mr Hambleton

that prior to retiring for the night in C's room, she had gone to her own room to use the bathroom but had not removed her tampon then. She stated that her tampon had been removed by the time she left the bedroom the following morning. The facts confronting Mr Hambleton were that at some stage during the night, FA had left the bed, removed her tampon, removed her underclothing and climbed back into the bed naked. Such acts should have been a clear demonstration to Mr Hambleton of her premeditation to seduce C into having sexual intercourse with her. That would also be consistent with her actions graphically described by C in his statement. The sexual intercourse and its foreplay took place over 30 minutes. It should have been inconceivable to Mr Hambleton that FA would not have been conscious of it or remember it. She would have sobered considerably by then. She stated in her evidence that the first thing she remembers is standing by the door of the room dressed only in her bathrobe. She nevertheless, but still in an alleged state of automatism, had the presence of mind apparently to find her room key and cell phones. To Mr Hambleton her allegations should have stretched his credulity.

[55] Instead, Mr Hambleton, as the inquirer, has entered into speculation to attribute motivation and actions to C for the purposes of justifying dismissal, which was simply not tenable on the evidence confronting him. Mr Hambleton claimed that the sexual intercourse occurred earlier than 4.00 am. This would be convenient to the company's position, as it would infer that C took advantage of FA when she was in a more intoxicated state than she would have been at 4.00 am. This pure speculation on Mr Hambleton's part does not escape comment in the determination of the Member of the Authority either. In the face of FA's failure to give any account, many of Mr Hambleton's decisions were made against the weight of evidence clearly confronting him. They were complete speculation and he should not have believed FA on the key issues. On an objective basis, his decision that C sexually harassed FA could not have been the decision of a fair and reasonable employer in all of the circumstances presented to him by the time the dismissal occurred.

[56] The fourth factor relates to the decision made against C with regard to his overall responsibility as a captain employed by ANL. C's union representatives submitted during the inquiry that this issue was a makeweight simply to add force to

the decision to terminate C's employment. In view of my conclusions on the other points this fourth factor remains as the only possible basis for Mr Hambleton to have taken disciplinary action against C. Even if it was sustainable, it gives rise to the issue of whether that was even-handed treatment between C on the one hand and FO and FA on the other. As Mr Hambleton has indicated in his report, FO also had responsibilities as a senior pilot although perhaps not to the same level as C as a captain. He was critical of FO almost in the same way as he was of C in respect of his responsibilities. He had also made the same findings against FO as he had against C in respect of the purchase and consumption of alcohol. In effect, the allegation of sexual harassment against C was the only distinguishing feature between them.

[57] ANL has relied heavily upon the document setting out the requirements, which a pilot has to reach before being promoted to the rank of captain. I accept that those responsibilities would continue after promotion. However, I do not accept that any deficiencies by C, in the circumstances of this case, on their own could reasonably entitle Mr Hambleton to dismiss C, particularly having regard to the different action he took against FO and FA.

[58] Having decided that the findings by Mr Hambleton of serious misconduct for purchase and over-consumption of alcohol and sexual harassment were unfounded and unreasonable upon the evidence before him, I consider the final issue may remain as somewhat of a makeweight. A further perspective on this issue is provided by the evidence of Captain Kenny.

[59] I have to say that I was impressed with Captain Kenny who struck me as a person with a great deal of acumen and common sense. Captain Kenny is Line Operations Manager with ANL and reported to the Flight Operations Manager who, in turn, reported to Mr Hambleton. Captain Kenny, like many pilots in the industry, has had substantial experience as a military pilot in the Royal New Zealand Air Force. Captain Kenny assisted Mr Hambleton in his investigation and from time to time discussed with him matters from a captain's perspective. However, he confirmed that the findings arrived at and the ultimate outcome were decisions of Mr Hambleton.

[60] Captain Kenny's evidence was directed primarily at C's behaviour in the context of his overall responsibilities as a captain with the company. He, like Mr Hambleton, placed emphasis on C's apparent lack of acceptance of responsibility during the course of the investigation. He also dealt in his brief of evidence with the realities and difficulties of C being re-integrated into the company if reinstatement is ordered.

[61] However, during the course of cross-examination by Mr Haigh and later questions from me, Captain Kenny responded in a revealing way, which I consider very fair. While I accept that primarily Captain Kenny considered C's behaviour unacceptable to the point where dismissal was the only outcome, his answers reflected realistic acceptance of an alternative point of view. In respect of the issue, also raised by Mr Hambleton, that C's failure to show insight was grounds for concern,

the following exchanges took place between Captain Kenny and Mr Haigh:

Q. You spoke about your concern about not expressing responsibility during this investigation and acknowledging mistakes you say occurred. Let me put this to you. In the context of this investigation if [C] had said Yeah I accept responsibility for all this, I shouldn't have done it, I shouldn't have had sex with her, I shouldn't have done any of these things, you know I suggest that he would have been dismissed anyway wouldn't he?

A. I don't know that actually Mr Haigh. I wouldn't like to speculate on

that to be honest because that would actually – if that had been [C's] response to the company at the very first investigation meeting we had which I was at, then I believe and I firmly believe this that events would have taken a very different course. Whether that would have ended up eventually in dismissal or not I'm not certain but I do know from the discussions that occurred after those meetings that there would have been some very different discussions going on between the interviewing team after those meetings.

Q. So what you're saying in effect is that had he acknowledged the responsibility that you felt he should, there's a very real prospect that he wouldn't have been dismissed?

A. Well just culture was applied throughout this and part of that is

firstly self reporting. The second thing definitely is the person's

ability to recognise that there is some fault and that they had a part to play and that they are prepared right from the outset to acknowledge that and then accept some responsibility toward repairing that fault and the just culture model operates within Air Nelson and that's what I say, I think things – the outcome may or may not have been different. I can't judge that but definitely the course of action as we went along I think would have taken a very different shape.

Q. So the answer to my question is that yes, there is a very real possibility, not probability, a very real possibility that he might not have been dismissed?

A. There is a possibility that he may not have been dismissed.

[62] Later, when I questioned Captain Kenny on the point, the following discussion ensued:

Q. Forgetting about whether it was a real possibility or a real [and significant] possibility you concede there is a possibility that if he'd acknowledged his mistake at the outset that he might not have been dismissed?

A. I do acknowledge that Sir.

Q. Doesn't that concession in some ways diminish the other grounds?

A. It doesn't because coupled with that is also the – not only the admission that something was wrong but also the steps to be taken to

rectify that problem. You'd have to be pretty sure that somebody was firstly quite genuine and that they – I'm thinking more in terms

of someone's made a mistake or ended up in a situation that something has happened that they really was outside their control or there was a loss of control of some kind and they wanted to try and

put that right and they're prepared to take the steps that it takes to

put that right. Firstly by admitting that there was a problem and secondly by taking the steps necessary to put that right.

Q. Okay the point I'm making though is this. Mr Hambleton did mention that [C] did not acknowledge his responsibility early on although he did later – I'll come back to that in a minute. But what he hung his hat on were the three things there was the sexual harassment as he called it, there was the issue with alcohol and then there was the behaviour which came within the general responsibilities of Captain. Those were the three grounds that were put forward firmly for dismissal. You now say that if he had acknowledged responsibility earlier that he might not have been dismissed. What I'm putting to you if those are the three grounds that were relied on and if the acceptance of responsibility might not have led to him being dismissed then doesn't it diminish the power of those grounds as a basis for dismissal?

A. I think it diminishes in the third one you mentioned, the Captain's

responsibilities. The first two I have to admit are not my area of expertise, they're more HR manager, the dealing with the policy – the drug and alcohol policy and the harassment policy but as a manager I have to know the basis of them but definitely the command responsibilities and the responsibilities of Captain. Had [there] been I think an earlier acknowledgement that there was some short-comings in that area then that side of those three statements, the third of those I

think is the area which we would have to say we probably wouldn't have gone down the same course in the way we thought as far as the third of those items.

[63] These were fair concessions by Captain Kenny. However, there is an element of unfairness arising if Mr Hambleton based his decision to dismiss partly on the fact that C had not, at a time earlier to the investigation before the Authority, made a soul searching expression of remorse and contrition. I can understand that he would have preferred such a statement to be spontaneous if it was to be made as without such spontaneity genuineness may be suspect. It was nevertheless incumbent upon him, if this was a feature which would have clinched less drastic disciplinary action against C, to have given some indication that it was expected. Further, even though this point received some emphasis in the evidence from these witnesses, ANL did not use it as a formal ground for dismissal. Nowhere in Mr Hambleton's report does he raise the issue of C's failure to accept responsibility as an underlying reason for the decision to dismiss. Nor did he put it as an issue troubling him at the meeting on 25 May 2009. It is not mentioned in his letter of 22

June 2009 in response to the answer he received from the New Zealand Air Line

Pilots' Association to his report. Nor was it raised at the final meeting on 25 June

2009 when dismissal was confirmed. It is certainly not a feature of his letter written the following day, 26 June 2009, where the only three issues raised as the basis for dismissal were the allegations as to abuse of alcohol, his failure in his responsibilities as a captain, and the sexual harassment. Nothing is mentioned about an underlying concern at the absence of genuine contrition and acknowledgement from C that he had failed his colleagues, fellow employees, and the company in his responsibilities as a captain, which appears to have been what Mr Hambleton expected. It did, however, seem to be of some importance in Mr Hambleton's view when he gave evidence.

[64] C did in fact express regret prior to the investigation held by the Authority. However, it was clearly not quite as wide ranging or directly connected to C's responsibilities as a captain as Mr Hambleton claims he would have expected. I have already indicated that within the confines of C's precarious position, initially under the police investigation, and subsequently subject to disciplinary action from his employer, he would have been closely advised by his union. C is not a person who I would assess as having ease in articulation. It may well be that his reticence in this respect was the reason that he was not as eloquent as he may otherwise have been. It is true that he may lack some insight. However, he is not the only one of

the witnesses who appeared before me to have difficulties in this way. Mr Hambleton also, upon my assessment, had difficulties in expressing himself. This is reflected in his somewhat contorted findings of sexual harassment, particularly in respect of his allegations of non-consensual sexual intercourse in the face of evidence before him pointing to the opposite. In that regard Mr Hambleton also indicated to me a lack of perspicacity in his overall assessment of what was really presented before him.

[65] The confidence of ANL in the grounds it used for dismissing C must be considerably weakened by the concessions Captain Kenny made as to the position being different if C had expressed some insight and regret. It seems to me that ANL cannot have been that confident as to the grounds for its decision to terminate C's employment if that decision would have been different had C made a fulsome expression of acceptance and insight into his wrongdoing. That is particularly so in respect of this fourth ground as Captain Kenny conceded.

[66] As I have indicated, the fourth ground in the context of the issues of the alleged sexual misconduct and purchase and consumption of alcohol may, therefore, well have been a makeweight. Whether it was or not, once the other three grounds are undermined and no longer tenable as justifying the actions of the employer, by applying the test under s 103A of the Act the final issue of C's overall responsibilities as a captain could not, on its own, justify dismissal. After all the behaviour then remaining for consideration by Mr Hambleton to justify dismissal on this ground would be immoral sexual conduct, nevertheless consensual in nature, between all three fellow employees and perhaps some minor errors of judgement by all three. For Mr Hambleton to regard the actions of C, in all the circumstances presented in evidence in this case, as a breach of his wider obligations as a pilot and therefore a ground for dismissal, would be unjustifiable and unfair. He would not be reflecting even-handed treatment between the three employees. C clearly acted on the particular evening in a way, which fell short of what may be regarded as acceptable standards of personal behaviour. All human beings make mistakes. I am quite sure that C, and for that matter FA and FO too, will have great regret for what they indulged in on that occasion. However, for ANL to elevate it on C's part to a breach of his obligations as a pilot and all that entails is taking it a step too far.

[67] Having regard to these factors, therefore, I do not consider that the issue of C's overall responsibilities as captain in the absence of any sexual harassment or excessive consumption of alcohol would be a justification on Mr Hambleton's part for termination of employment in all of the circumstances. C has accepted that he acted in a way, which was not appropriate. He did express remorse in his own way. It is clear, as both Mr Toogood and Mr Haigh accepted in their submissions, that he would not repeat such behaviour again. Certainly, any deficiencies in his responsibilities as a captain on that evening would at the most have justified disciplinary action short of termination of employment in the same way that FO was dealt with. Even-handed treatment by Mr Hambleton between employees for a shortfall in appropriate conduct for the same incident

would have required that. An open-minded approach to the inquiry by Mr Hambleton would have resulted in that.

[68] For these reasons, I disagree with the determination of the Authority following its investigation into the matter. The dismissal of C on an objective basis was not what a fair and reasonable employer would have done in all of the circumstances of this case at the time that the dismissal took place. The challenge therefore succeeds.

Remedies

[69] Having found that the dismissal was unjustifiable, the issue of reinstatement assumes importance. This issue was the subject not only of evidence but of submissions. The evidence that I heard from ANL related not only to the technical and practical difficulties in reinstating C after this period away from employment but also related to personal difficulties. This included evidence from a flight attendant and a former supervising flight attendant as to the personal difficulties, likely to be faced by other employees in working alongside C if he is reinstated as a pilot. Mr Toogood in his submissions dealt with reinstatement also in the context of contributory conduct on the part of C. He also made submissions on the impracticability of reinstatement from the point of view of general principle, more particularly the perception as to public confidence and safety. He also dealt with the more personal factors of loss of trust and confidence as between ANL and C, the assertion that responsibility for what happened has not been genuinely accepted by

C, and the issue of the impact on other employees that I have already discussed. As a lesser consideration he referred to the time and cost of retraining C in view of the length of his layoff.

[70] Mr Haigh, in his submissions, disputed the assertions being made in respect of this remedy. I perceive that he was submitting that they are overstated and exaggerated and indeed that was the gravamen of his cross-examination of the two flight attendant witnesses.

[71] Reinstatement, on the present state of the law, is to be the primary remedy and by virtue of s 125 of the Act must be provided wherever practicable. The issue therefore becomes that of practicability, subject to a consideration of contributing behaviour of the employee. In a case involving the type of occupation involved in this case, and where I find that the employee had a genuine personal grievance, I consider reinstatement is appropriate and practicable. So far as the inter-personal difficulties are concerned, considerable time has elapsed since the occurrence of the events, leading to this case being pursued. I heard evidence that FA is now employed in a position away from ANL with the parent company. I do regard the assertions of the flight attendants who gave evidence as overstated and exaggerated. ANL is part of a much larger group of companies with a substantial number of employees, and even though it is centred in a small provincial town, the difficulties can, in my view, be dealt with appropriately. As far as the technical difficulties are concerned, I consider these can be managed and I pass the comment that ANL did not seem to have any such difficulty in reinstating FO after his period of suspension of over 12 months. C gave evidence as to mitigation that he has been periodically employed in Australia flying the same or similar aircraft to those he would be required to fly for ANL. I do not regard the technical difficulties as being insurmountable. There was no evidence independent of company witnesses that elements of public confidence or safety would be compromised by C's reinstatement.

[72] Accordingly, the primary remedy I award to C is that he is to be reinstated. Whilst s 123(1)(a) of the Act speaks of a position no less advantageous to the employee, the practicalities are that C will need to be reinstated as a captain with

ANL. During the course of negotiations it appears that it was suggested that by way of settlement, C would be prepared to accept a demotion. That is not a condition I have jurisdiction to impose.

[73] As far as the claim for reimbursement of lost wages is concerned, there has clearly been mitigation as a result of actions taken by C following the dismissal. At the hearing, C claimed a figure of $51,597.00 as reimbursement. There was some discussion on quantum, which was left on the basis that counsel would try to reach an agreed position. C is to be reimbursed for lost wages to the date of his re- employment.

[74] A claim has also been made pursuant to s 123(1)(c)(ii) of the Act for loss of benefit. I presume this refers to the issue of superannuation. Little evidence was presented as to this claim. I note that C received a payout of superannuation at the time of dismissal. He may choose to pay that back into his superannuation scheme upon reinstatement. Subject to that sum, which appears to be a figure of $17,000, his superannuation is otherwise to be reinstated so that he is in the same position he would have been but for the dismissal. If there remains a dispute on the two issues of wages and superannuation that cannot be resolved amicably, then I reserve leave to either party to apply to the Court for resolution.

[75] In view of the length of time that C has now been away from the employ of ANL it is obviously not appropriate that his reinstatement take effect forthwith. A period of 21 days is to elapse from the date of this judgment for ANL to reinstate C. Reinstatement of wages and other financial entitlements is to take effect immediately.

[76] I am required to deal with the issue of contributing behaviour. It is a matter dealt with in submissions from counsel. C accepted in his evidence, and through Mr Haigh's submissions, that there was some responsibility on his part for what occurred and that he did not behave as he should have done. Nevertheless, in view of my findings, any contributing

behaviour on his part needs to be kept in context, particularly having regard to the way that FO and FA also behaved. Mr Haigh has submitted that contribution should affect monetary payments and not the primary

remedy of reinstatement and I agree with that submission. C's contributing behaviour is not sufficient to prevent reinstatement but there should be a reduction in the compensation, which would otherwise be awarded. The claim in the statement of claim for compensation pursuant to s 123(1)(c)(i) of the Act is quantified at $25,000. In all of the circumstances that is a claim that is not excessive. Having regard to some element of contributing behaviour, I fix compensation at $10,000 and order accordingly.

[77] As far as costs are concerned, I reserve costs. The principles applied by this Court on costs are well established in authority and I would hope that there could be some consensus reached on the matter of costs. If that cannot be achieved, counsel are to file memoranda within 21 days.

Prohibition on publication of name

[78] There is already a final order prohibiting the publication of the name of FO and FA. The application by C for such a prohibition was initially rejected in an interim decision of this Court.[7] That then went on appeal with the Court of Appeal

upholding the decision of this Court.[8] In the subsequent appeal to the Supreme

Court, the Supreme Court upheld the decision rejecting C's application.[9] However, in its decision the Supreme Court continued the interim order prohibiting publication of C's name for a final decision as to whether I should nevertheless decide, having heard this matter, that the interim order should be made permanent.[10] In view of my findings, as with FO and FA, the public and media no longer have a legitimate interest in knowing the identity of C. Quite apart from that, I have made an order for reinstatement, which I accept, may initially create some dissension between employees of ANL and difficulties for C being effectively rehabilitated and re- integrated within the company. These are not insurmountable difficulties but they will nevertheless not be made easier by publication of his name where he is to continue residing and to be re-employed in a small provincial community. In

addition to that, with the speculation already fanned by media reporting of the

circumstances involved in this case, I consider that C's wife and children have put up with enough. I have the benefit of having heard the case and being in possession of substantially more information and evidence than this Court had when it made its interim decision and when the matter was considered on appeal. I have accordingly decided that the interim order prohibiting publication of C's name is to be made final.

ME Perkins

Judge

Judgment signed at 1 pm on Tuesday 29 March 2011

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[1] *C v ANL Ltd* AA6/10, 13 January 2010.

[2] (1990) ERNZ Sel Cas 985 (CA).
[3] [2006] NZEmpC 46; [2006] ERNZ 415.
[4] [2007] ERNZ 66.
[5] [2008] ERNZ 462

[6] [2009] ERNZ 185
[7] *C v Air Nelson Ltd* [2010] NZEmpC 18.
[8] *S v Airline Ltd* [2010] NZCA 263.
[9] *C v Air Nelson Ltd* [2010] NZSC 110.
[10] At [2].
