

C = a Captain employed by AL
FO = a First Officer employed by AL
FA = a Flight Attendant employed by AL

[4] Until further order the names of C, FO and FA are not to be published in any form, and also the name of AL Limited and any evidence that tends to identify the employer and the employees who are involved in this case.

Events of Day 1 and Day 2

[5] This application is now to be determined against the following background and circumstances. C's conduct for which he was dismissed occurred over two days, which I will refer to as Day 1 and Day 2.

[6] On Day 1 when bad weather prevented take-off of the plane they had been crewing earlier that day C, FO and FA had to stay overnight in the city where their flight had been delayed. They all lived in another city where they would have flown back to, but for the disruption of the scheduled flight to that place.

[7] For their unexpected stay over C, FO and FA were booked into the hotel normally used by AL to provide accommodation for its employees overnighing as part of their job.

[8] On Day 1 at about 9 in the evening C, FO and FA travelled together from the airfield to the hotel, stopping on their way to buy liquor. The total bought was four bottles of red wine (each of 750 ml and 13% alcohol) and a six pack of small bottles of Corona beer (each of 330 ml and 4.6% alcohol). The \$60 cost was met by C and FO, who paid about half each.

[9] Once they had arrived at the hotel and had checked into their rooms C, FO and FA at about 10pm began drinking the wine and beer in C's room. FA freely participated in the drinking which, according to accounts given by C and FO, continued until about 11.30pm, and according to FA until about 12 midnight.

[10] In their accounts C and FO much later gave AL they claimed that not all four bottles of wine were drunk, as some of it was tipped out. FA said she had no recall of how much of the alcohol was drunk during the 1½ to 2 hour session.

[11] Before 5am next morning on Day 2, FA called a friend on her phone. According to that person FA was crying and incoherent when first spoken to. FA told her friend she had woken naked in the bed in C's room and thought she had had sex but could not remember the act. The phone call lasted about 20 minutes and there was another later in the morning during which FA repeated that she could not remember actually having sex but sensed that she had.

[12] At about 5am FA rang another friend. She was also an AL flight attendant and lived nearby in the same city where FA had spent the night. In response to the call FA's friend went straight away to the hotel and collected FA, whom she found in a distraught state, and took her back to her home where she was comforted.

[13] Later on Day 2 in the morning, FA decided that she wished to complain to the Police and was taken by her friend to the local station for that purpose. Over the next few hours she was given a drug and alcohol test arranged by AL and a DNA test conducted by the Police. FA's parents were contacted and they immediately flew on Day 2 from the city where they lived to be with her.

[14] FA's complaint was investigated by the Police Sexual Assault Team which took statements, including those of FA, C, and FO.

[15] AL's operations section had also been contacted early on Day 2 by FA's friend and colleague who had taken FA to her home, and AL was told what had been happening to FA. AL arranged for a senior person to travel immediately to be with FA and assist her, and be AL's person "on the ground" there.

[16] Later still on Day 2, C and FO were tested for drugs and alcohol and requested by AL management to provide their accounts in writing of events that had occurred at the hotel during the previous night while staying there. In response to that request the New Zealand Air Line Pilots Association (ALPA), to which C and FO belonged, advised that because the Police had become involved C and FO would be exercising their right to silence.

[17] AL then advised that it wished to meet C and FO to discuss whether they should remain rostered to perform flying duties in the meantime while investigations were taking place. That requested meeting was declined because the Police were investigating.

[18] AL decided that until it had obtained information about what had happened from all those involved, including C and FO, it would take them off the roster for further flying duties, although their pay would be continued. That particular action of AL is the foundation of a claim by C that he was unjustifiably disadvantaged through the suspension.

[19] AL commenced an investigation into the incident with the information it had received or obtained.

[20] The Police continued their enquiries for several months until they assessed the evidence obtained by them to be insufficient for charging anyone with a criminal offence in relation to FA's complaint. Letters to that effect were sent to C, FO and FA from the Sexual Assault Squad of the Police, which also advised that the Police would not be pursuing the matter further unless fresh evidence was found.

[21] Following that development C and FO and FA gave statements to AL and took part in their employer's inquiry into what had happened overnight on Day 1 and Day 2. Since then several months had gone by.

[22] AL received their accounts of how much alcohol had been purchased and in what circumstances, and how much of it had been consumed by the three, and over what period of time. Analyst's reports were obtained from the alcohol and drug test results.

[23] The tests of FA showed the presence of alcohol but no drugs in her body. The reports of the analysts were qualified as to the degree of their accuracy, as they had to be based on assumptions made and on FA's recollection of what she drank. A range of opinions given included that FA had engaged in binge drinking to a level of severe intoxication that was often associated with loss of memory of events occurring during the period of intoxication.

[24] The testing of C, which was not carried out until nearly 7pm on Day 2, about 19 hours after he said he had stopped drinking, showed no alcohol in his system. A forensic scientist estimated that his blood alcohol concentration was zero by 4.45am on Day 2. This was about 5 hours after he said he had stopped drinking and several hours before he was scheduled to fly again.

[25] In relation to the claim that she had been sexually assaulted FA told AL that she was unable to remember what had happened to her after midnight on Day 1, at which time she was still in C's room. She said she had awoken at 4.30am on Day 2 to find herself in C's room and without the underwear she had on earlier.

[26] Although FA said she had no memory of taking part in or being subjected to any sexual activity, she apprehended that her body had been used in that way. This was her belief partly because of her missing clothing and because of a sense she had.

[27] Although FA could not remember what had taken place between about midnight and 4.30am she was dismissive of the idea that she had willingly participated in any sexual activity with C. This she said was because he was married and had a family, and also because she had been having her period at the time.

[28] The statement C gave, as the AL manager investigating the incident observed, was substantially at odds with FA's. C confirmed that sexual intercourse had taken place between him and FA but he said that it had been initiated by FA. He said she had got into his bed after they finished drinking at approximately midnight and had woken him to have sex at about 4am. She stayed in his room until 4.30am on Day 2.

[29] C was clear in his statement that in his observation when intercourse took place between 4 and 4.30am, FA was not incapacitated in any way or to any extent that she was not conscious of what was taking place. In his account of her demeanour she had sought sexual intercourse with him and afterwards had smiled and spoken a few words when leaving his room.

[30] FO's statement was largely consistent with C's as to what had happened up to about 11.30pm on Day 1, when he had gone to his own room by himself. He said that after that he had seen or heard nothing further of anything that may have taken place in C's room.

AL's findings as to C's conduct

[31] AL concluded a prolonged investigation and met C and ALPA to advise them of its findings, which in summary were;

- C's actions in relation to the purchase and consumption of alcohol, having regard to the quantity and timing and circumstances involved in the un-scheduled overnight,

showed a serious lack of judgement on his part. He had purchased the alcohol with the intention of consuming all of it, late at night on Day 1, when duties of some description would need to be performed early on Day 2.

- C's actions in purchasing and consuming alcohol were irresponsible and unacceptable for a pilot with clear obligations, especially given that he was a Captain and the most senior AL employee present with FO and FA.
- In all the circumstances C's conduct towards FA amounted to sexual harassment. FA had been subjected to inappropriate and offensive physical behaviour of a sexual nature that was unwelcome and had offended or humiliated FA.
- Inextricably woven into the events leading to sexual harassment had been the presence of alcohol, for which C had the major responsibility. C's explanation that the sexual activity had occurred between 4am and 4.30am was implausible given that he had asserted FA was awake throughout and had participated in the activity and had then left immediately. It was more likely the activity had occurred at an earlier time, when FA was even more influenced by alcohol and to an extent that her judgment and memory could have been compromised.
- C's actions had fallen well short of the standard of professional conduct and leadership reasonably expected of a Captain employed by AL and while on an unscheduled overnight. Further, his actions not only compromised the welfare of crew members but placed at risk the safety of AL as an air line and its reputation.

[32] By the time AL had completed its investigation and delivered its findings, just over one year had gone by since the overnight incident had taken place on Day 1 and Day 2. During that period C (and FO) had remained suspended on pay.

[33] A further month then went by to allow C and ALPA an opportunity to comment on the conclusions and on C's proposal that dismissal was the appropriate outcome of the disciplinary investigation.

[34] At a meeting with C and ALPA, AL advised them of its final conclusion that there had been serious misconduct by C and that in all the circumstances the appropriate result was that he would be summarily dismissed from his employment with the airline.

[35] The dismissal was confirmed in writing to C the following day.

[36] FO's actions on Day 1 in purchasing and consuming alcohol, and in being an accomplice of FA in her drinking, were found by AL to be serious misconduct. Dismissal was considered by AL but not imposed and instead FO was given a final warning and a 12 month deferment of his eligibility for promotion to Captain. He was also required to undergo medical screening for alcohol abuse.

[37] FA has remained employed but has not performed Flight Attendant duties since Day 1. Over a year after Day 1 her employment future and her wellness apparently remain uncertain.

Consideration of the interim application

[38] Once the application for interim reinstatement had been lodged in the Authority, C and AL attended mediation on 31 July 2009, but they were unable to resolve the grievance.

[39] As required by s 127 of the Act, an undertaking has been given on behalf of C to abide by any order that the Authority may make in respect of damages.

[40] C seeks an order requiring AL to reinstate him pending the full investigation of his dismissal, and suspension prior to that, and a determination of the grievance raised in both respects. The substantive remedies claimed by C are permanent reinstatement, reimbursement of lost earnings and compensation for loss of dignity and injury to his feelings.

[41] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions and to also have regard to the object of the Act. The relevant law requires that four recognised tests or questions are to be applied to the circumstances of each case. In relation to the object of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence.

[42] A further relevant object of the Act, at s 101C, is the recognition of reinstatement as a remedy for any personal grievance. It has been made the primary remedy under s 125.

[43] In accordance with usual procedure, the evidence before the Authority for the purpose of determining the application was presented in affidavit form by the parties' witnesses, who were C and two managers of AL

[44] As the evidence must necessarily remain untested until the substantive investigation of the grievance claim, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses, including C and AL's managers, have been examined about their evidence.

[45] The standard tests or questions the Authority must consider in determining this application are:

- Is there is an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

Arguable case

[46] Mr Haigh QC for C submitted that there was present a strongly arguable case, or serious issue, to be determined. Mr Thompson for AL submitted the contrary, or that at best the case was only weakly arguable.

[47] In relation to the finding that C had sexually harassed FA, I find an arguable case is clearly present that the evidence FA relied upon was not sufficiently compelling or convincing to support what Mr Haigh submitted boiled down to a finding by the employer that C had raped FA.

[48] As a matter of principle the employer is not expected to conduct a trial and apply a standard of proof required in either civil or criminal litigation, but it is equally well established that the graver the misconduct alleged against an employee, the lesser the room for doubt there should be in the proof of misconduct the employer relies upon; *Honda NZ Ltd vNZ (with exceptions) Shipwrights etc Union* [1990] 3 NZILR 23 (CA).

[49] In the *Honda* case the Court of Appeal found that the Labour Court had correctly directed itself about the necessary standard of proof in its judgment where it had observed;

.....where a serious charge is the basis of the justification for dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave.

In explaining its view the Labour Court had said,

.....the more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct.

[50] Mr Haigh in his submissions accepted that where an allegation of sexual harassment is made by one employee against another, ultimately the employer, having taken into account all of the facts, is obliged to reach a conclusion as to whether or not disciplinary action should follow.

[51] At base the nature of the complaint by FA was that C had grossly violated her, and at a time when she may have been incapable of even trying to resist. The question must remain, for the substantive hearing, whether AL had obtained, or had tried to obtain, all evidence available that was relevant to its investigation of FA's complaint, and whether the conclusions of AL from the evidence it did obtain were reasonably able to be reached.

[52] I do not consider there is an arguable case that the finding of sexual harassment, if reasonably reached in the circumstances, would not by itself justify dismissal. However if the employer's finding about the presence of that justification cannot be upheld, that must give rise to a serious question as to whether dismissal for exercising poor judgment in relation to the buying and drinking of alcohol in the late evening on Day 1 and consensual sex, was justified.

[53] In that case the issue may become one of whether, even if there was no breach of any express provisions of the employment agreement or any applicable regulatory requirements, a display of poor judgement or lack of common sense went to the heart or root of C's employment contract with AL, to such an extent as to destroy or seriously undermine his employer's trust and confidence in him; *North Island Wholesale Groceries v Hewin* [1982] 2 NZLR 176 (CA). I find there is also an arguable case in this regard.

Balance of convenience and availability of adequate remedies

[54] I do not consider that the arguable case found to be present, lessens or displaces the weight that should be given the answer to this particular question, the second of the tests.

[55] In this case the time over which any order of interim reinstatement would apply is relatively short by comparison to the time now that has gone by since Day 2, when C was suspended from flying duties and what turned into a very long investigation began into allegations of misconduct by him.

[56] AL would seem to have little or no responsibility for the delay in concluding that investigation, as the Police were conducting their own investigation into FA's complaint of criminal offending by C who, as a consequence and while the investigation lasted, elected not to participate in AL's enquiry.

[57] C has accepted that if reinstated as an interim measure it would not be reasonable or practicable for AL to return him to flying duties, as he will not become eligible under the Civil Aviation regulatory requirements to fly again until he successfully undertakes retraining and is certified fit for flying duties. That exercise will require about 10 weeks and be at considerable cost to AL.

[58] I agree with the submission of Mr Thompson that effectively this acceptance by C means he is seeking to be reinstated to the payroll only, as AL did not employ him to perform any other work except flying. In the interim, before a final determination of the grievance claims, if C is not reinstated he will not lose any opportunity to practice his profession and retain the necessary licences or regulatory approvals to do that work.

[59] I find that the failure to resume payment of remuneration to C before his grievance claim is finally determined, can be fully compensated by the remedy of lost wages and interest awarded on the amount. That is an available remedy and it will be adequate as an alternative to interim reinstatement, I find.

[60] I do not share Mr Haigh's view that another objective to be achieved by interim reinstatement is the restoration of C's reputation, which is likely to have been considerably damaged by his dismissal and the rumour, speculation and advice inevitably flowing from that. Views well formed by now, and for a long time since

Day 2, are likely to be unchanged by an order of interim reinstatement, which of course is not a final determination of C's claims.

[61] The length of time that has gone by since the over-night incident, now well over a year ago, also means it is unlikely that damage to C's reputation will be restored within just a few weeks, before the full investigation of the matter by an interim reinstatement order and with the possibility afterwards that any loss of reputation may prove to be warranted.

[62] The non-publication order made will also tend to defeat the objective of interim reinstatement contended on behalf of C.

[63] In my view therefore in the circumstances of this case interim reinstatement will provide only a short and small stopgap measure for C against losing remuneration in the relatively brief period until a final determination can be made. If C is determined by the Authority to have been unjustifiably dismissed in relation to the allegation of sexual harassment and involvement with alcohol and poor judgment, C can rightly expect that the award of compensation will reflect what is likely to have been significant hurt feelings, humiliation, loss of dignity and loss of reputation suffered.

[64] In my view the balance of convenience strongly favours allowing the current situation to be maintained until a full investigation is held and a final determination can be given. The remedies of permanent reinstatement, compensation and reimbursement for lost wages, with due reduction for any contributory fault on his part, will then be available to C. Submissions may also be made on his behalf as to any recommendations the Authority should give to AL.

Overall justice

[65] As submitted by Mr Thompson, interim reinstatement is a discretionary remedy, although as with any discretion under the Authority's jurisdiction it must be exercised in accordance with principle rather than arbitrarily.

[66] Mr Haigh pinpointed the grave implications of AL's finding of sexual harassment against C in the particular circumstances accepted by AL as having been present at the time of his misconduct. There may also be serious implications for FA if the Authority finds that she did willingly have sexual intercourse with C and that

her claim of memory loss about that is implausible. If so it might be considered that her complaints to AL and the Police were made falsely.

[67] The question of FA's consent to sexual activity was central to AL's consideration of whether C had sexually harassed FA. AL's principal witness in his affidavit (at para. 75) has anticipated that the Authority will also have to consider that question as part of its investigation. It will clearly be relevant to an assessment of C's contributory fault under s 124 of the Act, if his claim of unjustified dismissal and/or disadvantage is successful.

[68] Because of these serious possible connotations from the conduct of C and FA it would not be just or effective to attempt now a winding back of the clock by an order temporarily reinstating C to his employment with AL. Lives have been dramatically changed by what happened on and after Day 1 and Day 2, and I find the overall justice of the case lies in leaving the existing state of things as it is for the relatively short time until AL's justification for suspending and dismissing C can be fully investigated and a final determination can be given from that.

[69] The Authority's discretion is to be exercised by not making the order sought.

Determination

[70] For the above reasons the application for interim reinstatement is declined.

Investigation meeting

[71] In consultation with Mr Thompson and Mr Haigh, the dates of 17 to 20 November 2009 have been fixed for the investigation meeting. I note that the Authority offered earlier dates in September and October, if the parties and counsel had been available then. A timetable will be directed by the Authority after counsel have again been consulted.

Costs

[72] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority