IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 54
EMPC 284/2015

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	H Plaintiff
AND	A LIMITED Defendant

EMPC 283/2015

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND BETWEEN	A LIMITED Plaintiff
AND	H Defendant

Hearing:	11-12 April 2016 (heard at Auckland)
Appearances:	R Harrison QC and R McCabe, counsel for Mr H A Caisley and S Worthy, counsel for A Limited
Judgment:	10 May 2016

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves claims which Mr H, a pilot, says arise from events which followed the issuing of this Court's judgment on 7 October 2014 (the first

judgment).[1] In that decision I awarded Mr H certain financial remedies and compensation, and directed that he be reinstated by A Ltd as follows:

> [150] Mr H is to be reinstated to his former position on the following terms:
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> a) A Ltd is to begin paying Mr H two weeks after the date of this decision.
>
> b) A Ltd is to restore Mr H to his former position no later than four weeks after the date of this decision.
>
> c) Mr H is to cooperate fully with any reasonable requirements of A Ltd necessary to facilitate his return to work, and is to be available to work two weeks after the date of this decision.
>
> d) It is recommended that Mr H be directed to undertake either counselling or therapy, whichever A Ltd determines is appropriate following consultation with Mr H, with regard to the acknowledged errors of judgment on his part as described in this decision.
>
> e) It is recommended Mr H be the subject of a written warning in respect of his acknowledged error of judgment for a period of 18 months from the date of his dismissal, 26 September 2013.
>
> f) Leave is reserved for either party to seek variation of these terms if circumstances require it, except in respect of the warning.

[2] Mr H alleges he was not returned to flying duties, but was confronted with what he describes as "stale allegations"; these related to assertions of sexual harassment which allegedly occurred between 2005 and 2010. A Ltd advised Mr H that it had decided to investigate these matters. In due course it stood him down from flying duties whilst the investigation continued.

[3] Subsequently, Mr H raised three disadvantage grievances with regard to the process which had been undertaken, alleging that the decision to investigate was unjustified, as was the subsequent decision to stand him down. A fourth was raised alleging that Mr H was disadvantaged when a domicile policy was not applied to him after he was stood down.

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1 *H v A Ltd* [2014] NZEmpC 189.

[4] Proceedings were then filed. The first was filed by A Ltd in the Employment Relations Authority (the Authority) in August 2015; it raised an interpretation issue as to a time limitation clause in the applicable collective agreement which governs the parties' employment relationship between A Ltd and the New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated (the CEA).

[5] Then, in September 2015, Mr H filed a proceeding relating to his grievances.

[6] The Authority determined that as the Court is familiar with the litigation between the parties, that because some of the allegations involved questions of law which ought properly to be addressed by the Court and/or could have wide application, and that having regard to the importance of the matter to the parties, it was appropriate to remove each proceeding to the Court.[2]

[7] Following removal of the proceedings, I made orders for non-publication of the parties' names and identifying details (as had the Authority when each proceeding was initiated) so as to preserve the integrity of the non-publication orders made in this Court in the first judgment.[3] I confirmed these at the commencement of the hearing; at the same time I made an order of non-publication of the names and identifying details of the five persons alluded to in para [2] of this decision – later I shall adopt letters of the alphabet when referring to each of them, so as to preserve their anonymity.

[8] A further procedural issue is that on 26 March 2015 the Court of Appeal granted A Ltd leave to appeal the first judgment.[4] Counsel advised that the hearing of the appeal will take place on 15 June 2016. No application for stay of the orders of this Court, in particular the order of reinstatement, has been made; nor has an application been made to vary the terms of the order for reinstatement pursuant to leave reserved.

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2 *A Ltd v H* [2015] NZERA Auckland 306; *H v A Ltd* [2015] NZERA Auckland 307.
3 *H v A Ltd*, at [131]-[148] and [154].
4 *A Ltd v H* [2015] NZCA 99.

Chronology

[9] It will be necessary later in this judgment to analyse particular aspects of the relevant events in some detail, but at this stage a brief outline will provide a context for the issues which the Court must resolve.

[10] On 14 March 2005, Mr H commenced his employment with A Ltd as a pilot.

[11] On 18 August 2013, an incident occurred whilst Mr H was rostered on a tour of duty to a Pacific destination, during a two-night layover prior to the return trip of the flight to New Zealand.

[12] That incident was the subject of an investigation, as a result of which A Ltd terminated Mr H's employment for serious misconduct.[5] This decision was made on 26 September 2013.

[13] Thereafter, A Ltd received information from three flight attendants (Ms A, Ms B and Ms C) which was made available by counsel for A Ltd to counsel for Mr H on 8 August 2014, shortly before the hearing relating to Mr H's dismissal grievance which commenced on 13 August 2014. A Ltd referred to this information at the hearing, it being contended that if Mr H was reinstated there would have to be an investigation of the issues involved.

[14] This information was referred to in the first judgment which was issued on 7 October 2014.

[15] On 20 October 2014, Mr H Pearce (who had undertaken the investigation which resulted in Mr H's dismissal) wrote to Mr H referring to this information by stating that A Ltd had received "initial reports concerning allegedly inappropriate behaviour by you towards female flight attendants". I shall refer to this significant letter in more detail shortly.

[16] On 21 October 2014, Mr H was reinstated to the payroll of A Ltd. On the same day, he raised a personal grievance through his union representative,

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5 *H v A Ltd*, above n 1, at [51].

Mr McCabe. He asserted that the initiating of an investigation into allegedly inappropriate behaviour was not the action of a fair and reasonable employer. He said that insufficient details had been provided, that Mr H should have been consulted prior to any decision to investigate, that the information referred to stale events, and that the decision lacked objectivity since it was taken by Mr Pearce whose decision to terminate Mr H's employment had been "recently overturned".

[17] On 30 October 2014, Mr Pearce forwarded a further letter to Mr H inviting him to meet and discuss return-to-work arrangements, including those provided for in the first judgment. There were a range of topics for discussion, including retraining, counselling/therapy, the provision of a warning as required by the Court, what were described as "new issues of concern", and issues as to back pay and compensation. Mr Pearce stated that the company was considering making an application to stay the judgment of the Court, but before doing so wished to discuss options for dealing with the financial awards made by the Court.

[18] By 5 November 2014, Mr D Paine, Senior Manager Pilots Shorthaul, had become primarily responsible for issues relating to Mr H's return to work and the investigation of the concerns which had been raised. On that date, he also prepared a plan which dealt with a wide range of matters relating to Mr H's return to work, including Civil Aviation Authority requirements and matters arising from the directions of the Court. The plan also described standards and expectations which would apply during the retraining period and after requalification. These issues were discussed at a meeting between the parties on 6 November 2014, which Mr H attended with Mr McCabe.

[19] On 11 November 2014, following the recommendation of this Court, A Ltd issued Mr H with a written warning in respect of the "acknowledged error of judgment" when Mr H entered a flight attendant's room and sat on her bed.

[20] Coming forward to 4 December 2014, several relevant events occurred. First, Ms A provided a signed statement; it was based on an unsigned statement which had been obtained from her after Mr H's dismissal, although there were amendments and additions to that document.

[21] It so happened that she and Mr H were each scheduled by A Ltd to attend the same emergency training course which was to be held that day. This was inadvertent. Ms A was distressed at such an unforeseen development, and left the course soon after arriving. She discussed what had occurred with relevant staff from A Ltd, including Mr Paine.

[22] On the same day, Mr Paine wrote to Mr H, attaching a copy of Ms A's signed statement. The letter stated that while the serious matters raised in the statement were investigated the company proposed to remove Mr H from flying duties, initially for 14 days on full pay as permitted under the CEA. Mr H was invited to respond by 1.00 pm the next day. A decision would be made by 5.00 pm on 5 December 2014.

[23] Early on 5 December 2014, Ms A sent Mr Paine and other relevant staff an email which stated that after the events of the previous day, she wished to withdraw her statement. She stated that she hoped her wishes would be respected. Mr H and Mr McCabe were not informed of this development at the time.

[24] Mr McCabe requested further time to respond to the proposal that Mr H be stood down from flying duties; his response was provided to Ms Paine later in the day. In summary, Mr McCabe stated that A Ltd was prohibited from investigating Ms A's adverse report because cl 3.9 of the CEA imposed a time limit of 14 days for the provision of such a report to the affected pilot; he said that since Ms A had raised her concerns with A Ltd some two years previously, the clause precluded reliance on her statement. Alternatively, it was submitted that there were no justifiable grounds to remove Mr H from flying duties, that he had not been given sufficient time or information to comment on the proposal to remove him from flying duties, and that he needed to continue his training so as not to be disadvantaged. He was to complete sessions in a flying simulator on 6 and 7 December 2014, and was rostered to commence line flying on 8 December 2014.

[25] That evening, Mr Paine wrote to Mr H, stating that the information which the company had received would, if substantiated, amount to a serious breach of the standards of conduct expected of employees. Accordingly, he considered it was appropriate to remove Mr H from flying duties on full pay in the interim, until the

parties attended mediation. There, the parties could discuss whether it was appropriate for Mr H to return to flying duties, or for the stand-down to continue.

[26] In a separate letter to Mr McCabe, in-house counsel summarised the concerns which had led to Mr H's stand-down, which she described as a "suspension", and she outlined the intended process of investigation. She did not accept there was a breach of the time limits in cl 3.9.

[27] On 8 December 2014, Mr McCabe raised a personal grievance regarding Mr H's removal from flying duties. That personal grievance was stated as having caused disadvantage under s 103(1)(b) of the Employment Relations Act 2000 (the Act), and discrimination under s 103(1)(c).

[28] A Ltd obtained further signed statements from Ms B, Ms C and Ms D on 11 December 2014, and from Ms E on 5 January 2015. These statements were provided to Mr H on 6 January 2015 in anticipation of mediation which was to be held the next day.

[29] On 9 March 2015, Ms A sent an email to Mr Paine, who had met with her a few days previously. She said that she had considered the issue of use of her statement, and stood by her decision to withdraw it. She asked "once again" that the statement no longer be used.

[30] Mr H was informed of this correspondence on 11 March 2015.

[31] Also on 11 March 2015, a further personal grievance was raised alleging a breach of A Ltd's domicile policy.

Issues

[32] As counsel for Mr H, Mr Harrison QC, submitted there were two dominant grievances raised by Mr H. The first concerned the decision by A Ltd to investigate information relating to the five flight attendants. The second related to Mr H's suspension from flying duties pending the outcome of the investigation. A further

and related grievance alleged that the suspension was a breach of the Court's order of reinstatement.

[33] The two primary grievances were pleaded as disadvantage grievances or, in the alternative, discrimination grievances. In closing, Mr Harrison confirmed that there was insufficient evidence for Mr H to sustain the discrimination grievances; they were therefore not pursued. Although there had been a related objection to one discrimination grievance based on lateness of notification, that issue fell away. Mr Harrison advised that the personal grievance concerning the employer's domicile policy had been satisfactorily dealt with by the giving of an undertaking on behalf of the employer. This was to the effect that should Mr H be returned to flying, he would be domiciled in his place of residence, and not in the city where he is currently domiciled. That undertaking would apply also to training for a return to flying. None of these matters therefore requires further consideration. I dismiss the (third) grievance which relates to the domicile policy.

[34] Having regard to the pleadings and the matters referred to by the parties when presenting their cases, the remaining issues for resolution by the Court can now be summarised.

[35] First, the issues related to the company's decision to investigate; was there unjustified action in one or more of the following respects:

a) Was Mr Pearce's original decision to investigate adequately reconsidered in light of the order of reinstatement?

b) Did the company comply with the applicable provisions of the CEA as to disciplinary investigations when deciding to investigate?

c) Did the company breach its good faith obligations by deciding to investigate without first providing Mr H with an opportunity to comment on the information which A Ltd had received, and/or on the possibility of an investigation being conducted?

[36] Secondly, did the decision to remove Mr H from flying duties amount to an unjustified action and/or a failure to reinstate him in breach of the order of the Court, in one or more of the following respects:

a) Was there a breach of the company's suspension policy for cases of serious misconduct: specifically cl 3.9 of the CEA which imposed a time limit for the provision of adverse information to a pilot; and a provision which required the employer to interview or discuss with an employee the possibility of suspension before deciding to take such a step?

b) Did the decision to remove Mr H from flying duties originate from an unfair and unreasonable decision to investigate?

c) Was the decision to remove Mr H from flying duties a breach of the order of reinstatement and/or did it, in circumstances where reinstatement had been directed, amount to unjustifiable action which affected Mr H's employment to his disadvantage?

[37] Finally, having regard to the Court's findings on the foregoing issues, what remedies, if any, are appropriate?

[38] I will deal with each of the foregoing issues sequentially, summarising relevant evidence and submissions, before indicating my conclusions in each instance.

Decision to investigate

Fresh assessment?

[39] It is alleged that A Ltd persisted with a decision to investigate which had been made by Mr Pearce in late 2013; and that there was no fresh assessment of whether there should be an investigation at the time of reinstatement as there should have been.

[40] A review of the circumstances which led to the company's decision to maintain an investigation must begin with what the Court was told when the dismissal grievance was considered.

[41] During the grievance hearing, Mr Pearce gave evidence as to the concerns which had been raised with him after Mr H's dismissal, and which were matters which he said he would immediately need to investigate if Mr H was reinstated to his former position. This was one of the factors which A Ltd relied on when opposing Mr H's application for reinstatement. These matters were referred to in the final judgment as follows:[6]

> Since Mr H's dismissal, three other female employees had informed Mr Pearce of circumstances where they believed Mr H had behaved inappropriately, leaving them uncomfortable about their working environment. Reference had also been made to an alleged fourth event. No steps had been taken to investigate these complaints, however, because Mr H was no longer an employee of the company and there was therefore no useful purpose in doing so.

[42] When discussing these concerns, I said:[7]

> [An] issue relates to the fact that there are other alleged incidents, dating from 2005. A Ltd through its counsel advised the Court that it "does not consider the substance of the concerns to be relevant, since they have not been investigated and are not at issue in these proceedings". However, Mr Pearce told the Court that he would need to investigate those concerns, were Mr H to be reinstated. It was submitted on behalf of A Ltd that given the issues of predetermination raised in this proceeding, it was inevitable that such an assertion would be raised again and that the parties would immediately be at logger-heads.
>
> Whether or not A Ltd may subsequently determine that an investigation of matters going back some nine years is appropriate is a matter on which it is inappropriate for the Court to comment. A decision to do so would need to be the subject of proper processes. The Court cannot forecast whether, if investigated, predetermination would be an issue, or whether an investigation into allegations could become protracted. These factors are hypothetical, and must be put to one side.

[43] I made it clear that any decision to investigate the matters referred to would be a matter for A Ltd, and would need to be the subject of proper processes. I did not find that an investigation of these matters could not occur.

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6 *H v A Ltd*, above n 1, at [110](g).

7 At [111](b).

[44] The first communication from A Ltd to Mr H, following the decision of the Court, was Mr Pearce's letter of 20 October 2014 to which I have already referred. It confirmed A Ltd had received initial reports of allegedly inappropriate behaviour. A reference was made to the matters referred to by Mr Pearce in evidence, and to the statement made by the Court about the company's intentions. Mr Pearce stated that the purpose of his letter was to provide a preliminary notification that A Ltd would be undertaking further inquiries; that additional information in relation to the concerns would be provided shortly; and that there would then be a meeting to discuss whether it was appropriate for Mr H to be stood down while the investigation was completed.

[45] On 30 October 2014 Mr Pearce wrote to Mr H proposing a meeting as to return-to-work issues, one of which related to the matters which he said "require further investigation".

[46] I find that the process of handover to Mr Paine occurred thereafter. It was completed by 6 November 2014, when the planned meeting occurred. Mr Paine attended it, tabling the return-to-work plan which he had finalised the previous day. There is no evidence that Mr Pearce was involved in any substantive way thereafter.

[47] Mr Paine was questioned as to whether there was a fresh consideration of the decision to investigate in light of the Court's decision. He stated that there was a discussion on this topic attended by him, Mr Pearce, in-house counsel and counsel representing A Ltd for the purposes of the proceeding, after the first judgment was issues. He said the question which was discussed on that occasion was whether there was "… an obligation to investigate". He could not recall when this discussion occurred. No record of the discussion was produced.

[48] Mr Harrison submitted that Mr Paine's evidence as to a consideration of the decision to investigate was vague and should not be relied on. He argued that it was more likely that the decision made by Mr Pearce before the dismissal grievance hearing was simply persisted in thereafter, without any regard to subsequent events, including the directions of the Court.

[49] Mr Caisley, counsel for A Ltd, submitted in essence that the decision to investigate was one made in good faith and according to the company's legal duties. Not to have inquired into the matters raised, which were potentially serious since they could require either disciplinary or non-disciplinary action, would have been irresponsible and a breach of the company's health and safety obligations. He also submitted that the decision to investigate was made appropriately under the provisions of the CEA relating to "Investigations and Discipline".

[50] I accept Mr Paine's evidence that there was a discussion which focused on the question of whether there was an obligation to investigate in the new circumstances. I find that although the decision to do so involved Mr Pearce, it was a decision which also involved others and it followed the issuing of the first judgment. Such a conclusion is supported by a letter from counsel for A Ltd to counsel for Mr H's of 30 October 2014, in which it was confirmed that "The decision to investigate the concerns which have come to the company's attention was not made by Mr Pearce personally or solely." Although there is modest detail on the topic, I am satisfied there was a reconsideration of the decision to investigate which involved two senior managers and the company's lawyer.

[51] I do not consider that it was inappropriate for A Ltd to determine that it should undertake an investigation of the information in question, simply because the Court had made an order of reinstatement. When considering that issue, the Court had not been invited to find that such an investigation could not occur, or to direct that an order of reinstatement should be on terms that such a process could not be undertaken.

[52] The Court left open the possibility of such an investigation occurring, emphasising that any decision to do so would need to be the subject of proper processes. The question for consideration now is whether the company did in fact undertake a proper process.

Compliance with applicable provisions of CEA?

[53] For the purposes of this issue, it is necessary to consider the provisions of the CEA which regulate investigations into questions of operational performance, and

investigations into misconduct which might result in discipline. Those provisions state:

> 4. **INVESTIGATIONS AND DISCIPLINE**:
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> 4.1 Notwithstanding the ability to discuss matters which arise from time to time, where any event occurs which the Company decides to investigate and which involves a decision to interview any pilot the following shall apply:
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> 4.1.1 The Company shall write to the pilot concerned requesting an interview and stating whether the investigation is into a question of operational performance which does not involve any question of discipline of the pilot or, in the alternative, whether it is investigating misconduct which may result in discipline, and enclosing a copy of all relevant information available to it at that time.
>
> 4.1.1.1 Where the occurrence involves only questions of operational performance, the Company shall also clearly state the nature of the question to be investigated in sufficient detail for the pilot to be able to prepare for participation in the interview. The Company shall also state that the contents of the interview will not be used to attach blame, nor in any disciplinary context, and that no disciplinary action shall arise from the occurrence. No reference to the investigation, or to any corrective training arising as a result, shall be noted in the pilot's personal file. The purpose of this process is to encourage free and open reporting in support of safety rules. If the appropriate manager considers a pilot may have misled the investigation, then the Company may initiate a disciplinary investigation into the alleged misleading conduct.
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> 4.1.1.2 Where the occurrence involves a question of possible misconduct, the Company shall also clearly state the alleged misconduct which it is concerned may have occurred in sufficient detail that the pilot will be able to prepare for the interview, and that disciplinary action may follow as a result of the investigation.
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> 4.1.2 Sufficient notice shall be given of any interview to enable the pilot to properly prepare for the interview and to seek advice and/or arrange for representation if required.
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> 4.1.3 A pilot attending an interview shall be entitled to be accompanied by another pilot of his choice and/or be represented and advised at the interview by an official of The Association or a legal representative.
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> 4.2 Where discipline results from the interview process, and without restricting the forms of disciplinary actions available, the following shall apply:
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> 4.2.1 Any formal warning shall not normally remain in force for a period in excess of 9 months; and
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> 4.2.2 Except in the case of summary dismissal, the initiation of a personal grievance by the pilot shall mean that any disciplinary measure

decided upon by the Company may be implemented but until a final decision in relation to the personal grievance is issued by the appropriate body, the pilot's pay and any incentive payments shall continue to be paid at the rate applicable prior to the disciplinary measure being determined; and

4.2.3 Notwithstanding The Company may remove the pilot from flying duties, but only on pay in accordance with 13.3.3.5, during the interview/investigation process and/or during any subsequent personal grievance process. Pilots removed from flying duties in such circumstances shall remain contactable by the Company.

[54] Also relevant to the issues in this case is cl 3.9 of the CEA, which appears in a section entitled "Terms of Employment". It provides:

3.9 ADVERSE REPORTS

3.9.1 Any adverse written or verbal report which might prejudice the promotion and/or future of a pilot shall be communicated to him in writing by the Company within 14 days of such report being received by the appropriate Fleet Manager or his delegated deputy.

3.9.2 Any pilot shall be entitled, if dissatisfied with any decision given by an officer of the Company in respect of any matter affecting such pilot, personally, to appeal from such decision to the immediate superior of such officer, but his appeal shall be in writing and a copy shall be supplied to the officer whose decision is appealed against.

[55] Mr Harrison submitted that in the unique circumstances which existed here, including the length of time A Ltd had been in possession of the adverse information, the age of the assertions involved, and the circumstances where court-ordered reinstatement was to occur, Mr H should have been invited to comment on the possibility of an investigation being undertaken at all. Mr Harrison conceded that a court would not normally intervene in a decision to commence an investigation, but he argued that the circumstances of this case required such to occur in this instance.

[56] Mr Caisley submitted that the company was under a duty to investigate, having regard to its health and safety obligations. Mr Harrison's rejoinder was that any such duty was necessarily fact-specific, and that all that could be said was that the company had a discretion whether to commence any particular investigation on health and safety grounds.

[57] At the time, express duties as to health and safety matters were prescribed under the Health and Safety in Employment Act 1992.[8] For example, s 6 of that Act provided that an employer was required to take all practicable steps to ensure the safety of employees while at work. The section also stipulated that while at work employees were not to be exposed to hazards arising in a place of work. The definition of "hazard" in s 2 of that Act included a situation where a person's behaviour may be an actual or potential cause or source of harm to another person. An assault, coercive behaviour, or personal harassment, could in my view fall within the four examples of cases where a person's behaviour may give rise to actual or potential cause or source of harm to another person.[9] Although every employer was required to maintain a register of serious harm events (s 25(1)) and was required to notify Worksafe of the occurrence of serious harm (s 25(3)), the then Act did not stipulate that an employer was under an obligation to investigate any such incident. Nevertheless a fair and reasonable employer could conclude that, given the duty to take "all practicable steps", it had an obligation to investigate a matter of this kind.

[58] However, it is also necessary to consider the obligations of the Act with regard to complaints of sexual harassment. The dicta of the former Chief Judge in *Sloggett v Taranaki Health Care Ltd* is of assistance.[10] In that case, a complaint of sexual harassment had been made, and the Court considered the options available to the employer upon receipt of a complaint in those circumstances under the Employment Contracts Act 1991. It was explained that the employer had to consider the matter in relation to both the complainant, a nurse, and the subject employee. As to the circumstances of the nurse, Chief Judge Goddard stated:[11]

> The reality was that the respondent as employer had received from one of the nurses employed by it a complaint in writing, in effect, that she had been subjected to spoken and physical behaviour of a sexual nature that she found unwelcome or offensive or both. She also made it tolerably clear in her complaint that the behaviour was both repeated and of such a significant nature that it had a detrimental effect, if not on the totality of her employment, at least on her job performance or job satisfaction. She

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8 This Act has since been repealed and was replaced on 1 April 2016 by the Health & Safety at Work Act (2015).

9 See *Healthland South Ltd v Flanagan* [2000] 1 ERNZ 63 (EmpC) at 77; *Makeham v New Plymouth District Council* [2005] ERNZ 49 at [31]-34]; and, in respect of harassment by writing obscene graffiti in toilets, *T v G* WEC 62/95, 13 September 1995.

10 *Sloggett v Taranaki Health Care Ltd* [1995] 1 ERNZ 553.

11 At 557-558

> identified the appellant, then employed by the respondent in the capacity of a hospital orderly, as the perpetrator. Thus all the elements of a complaint of sexual harassment under s 36 of the Employment Contracts Act 1991 were present in copious quantity. It was the respondent's legal duty to the nurse as her employer to inquire into the facts and, if satisfied that such behaviour as she alleged took place, to take whatever steps might be practicable to prevent any repetition: …

[59] Section 36 of the Employment Contracts Act 1991 relevantly provided that an employer, on receiving a qualifying complaint, was required to inquire into the facts. The present manifestation of that obligation is found in s 117(3) of the current Act, which provides that where an employee makes a complaint about certain requests or behaviour amounting to (inter alia) sexual harassment, the employer, on receiving the complaint, must inquire into the facts in each case.

[60] It is my assessment of the information received by A Ltd, that the concerns raised by the flight attendants as to Mr H's conduct amounted to complaints of sexual harassment. Accordingly, A Ltd had a duty to inquire under s 117 of the Act.

[61] Accordingly, A Ltd could properly conclude it had a duty to investigate.

Provisions of CEA

[62] It was submitted Mr H should have been provided with an opportunity to comment on the possibility of an investigation being conducted since the circumstances were unusual. However, cl 4.1 imposes no such obligation. The provision of an opportunity to respond to concerns which A Ltd may decide to investigate before it makes any decision is provided by the later provisions of cl 4.

[63] Mr Harrison also submitted that the notice provisions in cl 4 of the CEA were not complied with. He argued that cl 4.1.1 described the first step to be taken, and said that A Ltd had not complied with it when sending its initial letter of 20 October 2014. This was because a copy of all relevant information available at the time was not enclosed;[12] nor did the letter clearly describe the alleged misconduct in sufficient detail to enable Mr H to prepare for an interview.[13]

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12 As required by cl 4.1.1.

13 As required by cl 4.1.1.2

[64] The company made no submission in response to this assertion, possibly because the issue was not specifically pleaded. In any event, I am not satisfied that there was a substantive breach of the provisions of cl 4.

[65] First, the letter was said to be a "preliminary notification" that enquiries would be undertaken, that "additional specific information" would be provided, and that it was then likely that a meeting would be convened to discuss the possibility of Mr H being stood down whilst the investigation was completed.

[66] The subsequent letter of 30 October 2014 confirmed that a meeting would take place on 6 November 2014, when one of the matters to be discussed related to the proposed process for investigating the issues which had been raised. It was evident that a staged process was intended, and that Mr H was not required at the "preliminary" stage to comment or respond.

[67] Although a copy of the information held by A Ltd was not physically attached to the letter, it was clearly described with reference to para [111] of the first judgment. There could have been no doubt as to what the company was referring to.

[68] A concern was expressed in that letter that the initial reports which A Ltd had received concerned "allegedly inappropriate behaviour by you towards female Flight Attendants". That statement was sufficiently precise to put Mr H on notice as to the concerns held, given the preliminary stage of the process. The notice requirements of cl 4 were not in my view contravened in any significant way in either of these respects, and there was no prejudice to Mr H.

Clause 3.9.1: interpretation

[69] The parties disagree as to the application of cl 3.9.1 which imposes a time limit of 14 days for the provision of an adverse report to an affected pilot. The issue concerns what is to happen if there is a late provision of an adverse report. It is common ground that there is no basis for implying any terms; the issue is one of interpretation.

[70] Since the issue was raised by A Ltd in the statement of claim of the removed proceeding which it initiated, as well as the counterclaim in respect of Mr H's proceeding, I summarise the submissions made for the company first.

[71] Mr Caisley submitted that the clause provides a timeline for the provision of adverse reports, but it does not stipulate any consequence if the 14-day window is missed for any reason. He said the parties should be taken to be aware of the context of any investigation, including the applicable provisions of employment law including s 103A of the Act. In light of that context, it should be assumed that the parties chose not to specify a consequence, and they intended that the statutory provisions of providing a test of justification based on what a fair and reasonable employer could have done in all the circumstances would ensure that no inequities would arise if there was not compliance with the time limit.

[72] It was also submitted that a comparison between cl 3.9.1 and cl 3.16 was significant. That clause specifically provides that the company could not, until procedures had been established according to relevant provisions of the CEA, use information from data recorders to monitor the performance of pilots. No limitation of this or any other kind appears in cl 3.9.

[73] Mr Caisley also submitted that any other interpretation would be contrary to business or employment relations commonsense. He said that given the legal obligations on the company to provide a healthy and safe workplace, and to safely operate its aircraft, the parties could not be taken to have agreed on an approach which would prevent a necessary investigation of issues of concern.

[74] Mr Caisley went on to submit that adverse reports could range from issues of physical safety such as the safe operation of aircraft, to mental health and safety issues such as the fitness of a pilot to fly. He referred to the recent example of a Germanwings A320 First Officer who killed himself and 149 passengers when he locked the captain out of the cockpit of an aircraft and crashed it into a French mountainside. The First Officer, he said, was deeply depressed at the time of the incident and had exhibited mental health issues prior to the flight. Applying cl 3.9.1 to such an example, Mr Caisley suggested that if information regarding a pilot

expressing similar mental health issues was not provided within 14 days, perhaps due to absence on sick leave of a relevant manager or an email failure, it would be inconceivably irresponsible of A Ltd not to investigate.

[75] Mr Harrison submitted that the clause was intended to have mandatory effect since it stated that a written or verbal report "shall" be communicated to the pilot in writing within 14 days of receipt. He said that any other approach which permitted a reliance on an adverse report forwarded more than 14 days after receipt would render the clause completely ineffective.

[76] In response to the earlier submission that it was inherently unlikely the parties could have meant the company was precluded from otherwise investigating a matter such as one relating to the mental health of a pilot, he submitted that the clause was plainly limited in scope and operation to disciplinary matters. It would not apply to a question of operational performance. Such a distinction was expressly contained in cls 4.1.1 and 4.1.2, and should of necessity apply to cl 3.9. Information concerning operational competence could be made available and acted on by A Ltd after 14 days of receipt, but not for disciplinary purposes.

[77] Mr Harrison submitted that a further example of such a distinction was provided by the failure to report provision contained in cl 3.4.4. That clause stipulates that where after due enquiry it is established that a failure to report by a pilot was due to fault on his or her part, a deduction from pay could be made. Since such an enquiry was not a disciplinary process, cl 3.9.1 would not apply if adverse information relating to a failure to report was not provided to the affected pilot within 14 days.

[78] Finally on this point, Mr Harrison submitted that s 103A of the Act could not be regarded as relevant to interpretation of the clause to approach the matter on this basis was effectively to imply a new term.

[79] The very recent decision of the Court of Appeal in *Air New Zealand Limited v New Zealand Airline Pilots Association Inc*[14]provides a convenient summary of

[14] *Air New Zealand Ltd v New Zealand Airline Pilots Assoc Inc* [2016] NZCA 131.

relevant interpretation principles when construing a collective agreement. First, the Court referred to two decisions which have been relied on in numerous cases of contractual interpretation: *Vector Gas Ltd v Bay of Plenty Energy Ltd*[15] and, in the employment context, *Silver Fern Farms Ltd v New Zealand Meat Workers & Related Trades Unions Inc.*[16]

[80] Then the Court went on to state:[17]

> [34] … there have been two [recent] authoritative restatements of the correct approach to the interpretation of contractual provisions. First, in *Firm PI 1 Ltd v Zürich Australian Insurance Ltd* the Supreme Court emphasised:
>
> > [63] While context is a necessary element of the interpretative process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.
>
> [35] Second, and to similar effect, is this observation by Lord Neuberger in *Arnold v Britton*, in the United Kingdom Supreme Court:[18]
>
> > [15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Home Ltd*. And it does so by focusing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn [v Simmonds]*; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)*, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali*, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky [SA v Kookmin Bank*, per lord Clarke of Stone-cum-Ebony JSC.

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15 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

16 *Silver Fern Farms Ltd v New Zealand Meat Workers & Related Trades Unions Inc* [2010] NZCA 317, [2010] ERNZ 317.

17 *Air New Zealand Ltd v New Zealand Airline Pilots' Assoc Inc*, above n 15, citing *Firm Pl 1 Ltd v Zürich Australian Insurance Ltd t/a Zürich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

18 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15] (footnotes omitted).

[81] I proceed by applying these principles. I begin by considering the natural and ordinary meaning of the words used in cl 3.9.1. An obligation clearly arises from the use of the word "shall". Although there are some circumstances where this word does not impose a duty to act, such as where a power is conferred,[19] I do not consider the word is used in a facultative sense on this occasion. On the face of it there is a mandatory duty to provide a copy of the adverse report to the affected pilot within 14 days of receipt. The key issue in this case relates to the consequences of non-compliance with the time limit.

[82] I turn next to consider whether there are any other relevant provisions of the CEA which assist in interpretation. Mr Caisley referred to cl 3.16, which describes the provisions which are to apply in respect of information obtained from an air data recorder. The legitimate use of information obtained from such a recorder is described in some detail.

[83] Clause 3.16.1.1 states that the data may not be used in connection with the disciplining of pilots, or to monitor their performance, except as is provided in cl 3.16.2.

[84] Such data may, however, be used for quality assurance purposes in certain circumstances. Clause 3.16 provides that procedures may be established for such purposes in this way:

> 3.16.2.2 Until such procedures have been established, the Company shall not use any form of air data recorder or the emissions or recordings of air data recorders to monitor the performance of pilots.
>
> 3.16.3 Other than as provided herein, or as provided by law, the Company shall not release any air data recorder, or any recording or data derived there from, to any person or organisation.

[85] In short, the parties specifically described the limitations that would apply to information relating to the performance of pilots where that information was available from an air data recorder. By contrast, in cl 3.9.1 the parties did not provide any such limitation in respect of information arising from an adverse report

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[19] *Davis, Re* (1947) 75 CLR 409 (HCA) at 418.

not provided within 14 days of receipt to the relevant pilot. In my view, the absence of any stated limitation was deliberate. I find that the parties did not consider such a limitation was needed.

[86] Next, I consider the overall purpose of the clause and the CEA. I accept Mr Harrison's submission that cl 3.9.1 must be seen as a mechanism to ensure prompt and timely notice to pilots covered by the CEA of potentially prejudicial adverse reports, to enable that individual to respond fully while events are fresh and memorable, as an aspect of a fair investigation.

[87] But that objective must be assessed in the context within which the CEA was agreed. It covers persons who are employed to fly aircraft, as well as pilots who perform managerial, supervisory, flight examining, flight instruction, flight checking and training duties; or other relevant projects or administrative functions. Such pilots may serve A Ltd in New Zealand, or in any other part of the world where A Ltd may operate from time to time, or to or from which aircraft are required to be flown.

[88] Such work is highly prescribed and regulated, with an understandable emphasis on safety standards, as required by statute and the relevant prescriptive instruments which a participant in aviation is required to hold and with which that pilot is required to comply.[20] It is obviously the case that A Ltd has onerous legal duties to ensure the health and safety of its employees and its customers. This is the context within which pilots employed under the CEA must operate. Given those circumstances it is inherently unlikely that the parties intended that in no circumstances could delayed information be relied on for disciplinary purposes.

[89] The CEA is dated 5 November 2012; by that date s 103A of the Act had been amended to its present form. That section is relevant to context. I accept Mr Caisley's submission that the parties, both of whom were well experienced in employment matters, could reasonably be regarded as being aware of the processes for resolution of employment relationship problems, including the right of employees to raise personal grievances and have those resolved by the Authority or

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[20] For example Civil Aviation Act 1990, s 12; Health & Safety in Employment Act 1992, ss 3A, 6-12B, 16 (the Act in force at the time in question, see above n 9).

the Court. Indeed, a plain language explanation of these processes was contained in Section 6 of the CEA. I find that the parties must have been aware of the fact that non-compliance with cl 3.9 could be assessed, if need be, under s 103A of the Act.

[90] I turn finally to the issue of commonsense. It would not make employment relations commonsense for an adverse report to be rendered irrelevant for disciplinary purposes, where otherwise the circumstances justified an investigation into misconduct. That is obviously the case where there are circumstances such as mental health issues or harassment issues which could impact on health, or safety. It does make sense to conclude that a safeguard was intended to be provided by the statutory test of justification under s 103A of the Act.

[91] I do not accept the submission that such a conclusion amounts to the implication of the term; rather, such a conclusion recognises the obvious statutory context within which the clause must be understood.

[92] I finally deal with the submission made for Mr H to the effect that the clause only has application in a disciplinary context but would not apply to an investigation relating to operational performance. There is nothing in the clause or elsewhere to suggest the parties intended such a restriction. Adverse reports are to be referred to the relevant pilot in a timely way so that the relevant circumstances are brought to his or her attention promptly; I find that the parties intended that this desirable objective would be just as applicable to a potential operational or performance issue as it would be to a disciplinary issue.

[93] In summary, then, I conclude that although there is an expectation that an adverse report will be provided to a pilot promptly and within 14 days of it coming to the attention of relevant personnel of the employer, where that does not occur and where the pilot raises a personal grievance, the issue of late submission is able to be assessed under s 103A of the Act.

Application of cl 3.9.1

[94] There are three dates when information was provided either to Mr H or a representative on his behalf for the purposes of cl 3.9.1. I deal with each in turn.

[95] The first is 8 August 2014. Information derived from or about four flight attendants was submitted by counsel for A Ltd to counsel for Mr H, shortly before the grievance hearing commenced in this Court. In respect of Ms A, there was an email dated 30 October 2013 claiming she had an "incident" with Mr H and knew of others. Also included was an unsigned statement of December 2013 referring to the incident which Ms A stated had occurred approximately five years previously; she also referred to an incident involving Ms E which allegedly occurred in January 2010.

[96] In respect of Ms B, there was an email making allegations against Mr H. There was also an unsigned statement bearing a date of 13 December 2013 which stated that Ms B believed the alleged incident may have occurred on 15 March 2005 (the day after Mr H's employment with A Ltd commenced). The statement referred also to inappropriate conduct involving Ms D on the same occasion.

[97] In respect of Ms C, there was information provided by her in an unsigned statement dated 5 December 2013, following a telephone interview with Mr Paine which from later information from Ms C, appears to have allegedly occurred in 2005 or 2006.

[98] When this information was provided to counsel, Mr H was of course not a current employee. Subsequently, he was directed to be reinstated to his former position no later than four weeks after the date of the first judgment which was issued on 7 October 2014. The first communication with regard to a potential investigation was the letter of 20 October 2014 which was sent by email and dispatched by courier to his home address that day. His status of employee was confirmed when he was placed on the payroll on 21 October 2014; I find that he was reinstated with effect from that date.

[99] Mr Harrison submitted that the information which had been provided in the context of the Court proceedings in August 2014 could not result in compliance with cl 3.9.1 from the moment of reinstatement. That is because, it was submitted, the clause requires a formal step by way of communication to the pilot, so that at the very least, the pilot understands that he or she is in receipt of an adverse report.

[100] The initial letter clearly referred to the information which had already been provided and which had been referred to by the Court in the first judgment. It explained that the company intended to proceed with an investigation on the basis of that information. The writing of the letter confirmed that Mr H was being treated as an employee of A Ltd, and he was put on notice of the intended investigation. Mr H could properly have understood that he was in receipt of an "adverse report" as an employee. Accordingly, the information which had previously been disclosed to Mr H's lawyer, and which the company was now confirming it would rely on, is not precluded from consideration by cl 3.9.1 since it coincided with Mr H's reinstatement as an employee of the company.

[101] Turning to the next occasion when an adverse report was provided, Ms A signed an amended version of her statement on 4 December 2014. It was forwarded to Mr H on the same day, so that there was apparent compliance with cl 3.9.1. For Mr H it was argued, however, that the report had to all intents and purposes been in A Ltd's possession since 13 December 2013. It was submitted that the amended statement took the matter no further so that the earlier date had to be relied on for timing purposes. I disagree. The version of events forwarded on 4 December 2014 differed in material respects from the earlier version; and it was on this occasion signed. It was yet another adverse report for the purposes of cl 3.9.1. Its provision to Mr H fell within the requisite time limit.

[102] The third relevant date is 6 January 2015, a date prior to the day for which mediation had been organised for the parties. Signed statements had been taken from Ms C, Ms D and Ms E on 11 December 2014. They were provided 12 days outside the time frame prescribed by cl 3.9.1.

[103] On the basis of my conclusions as to the correct interpretation of cl 3.9.1, the breach of the stated time limit does not rule out reliance by A Ltd on that information for disciplinary purposes. It did, however, provide an issue which may require assessment under s 103A of the Act in due course. It is not yet appropriate to consider the question of whether a fair and reasonable employer could have relied on this material, and/or whether the delay should be regarded as a minor defect and one which did not result in Mr H being treated unfairly under s 103A(5) of the Act. That

is because the parties have yet to undergo a process in respect of the information which was submitted. Mr H has provided no formal response to the issues raised by each of these flight attendants, including whether any prejudice arose through the late provision of the adverse reports.

[104] I find that there was not a breach of cl 3.9.1 by the late submission of adverse reports on 6 January 2015, but there may need to be an assessment as to whether the delay caused unfairness following any subsequent processes which may be undertaken.

Good faith

[105] It was submitted for Mr H that the decision to investigate stale allegations breached the general duty to act in good faith under s 4(1)(a) of the Act; and the duty to provide Mr H with an opportunity to comment on information before the decision to investigate was made under s 4(1A)(c). It was suggested in this context as it had been earlier that the decision to investigate was simply carried over from late 2013, that it was wrongly understood that there was a duty to investigate, and that Mr H should have been offered the opportunity of commenting on such a possibility before a decision to do so was made.

[106] For A Ltd, it was submitted that the company had acted in accordance with the CEA, and with relevant statutory obligations.

[107] The following parts of s 4 of the Act are relevant:

> **4 Parties to employment relationship to deal with each other in good faith**
>
> (1) The parties to an employment relationship specified in subsection (2)–
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything–
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)–
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected–

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

…

[108] I consider first the duty described in s 4(1A)(c). Was the decision to investigate, as conveyed in the letter from A Ltd to Mr H of 20 October 2014, one which would, or was likely to, have an adverse effect on the continuation of his employment?

[109] As already explained, the letter of 20 October 2014 was a preliminary notification of the process to be followed in an intended investigation. It was made clear that the provision of relevant information would be followed by a meeting. A fair process was described. It was made clear that Mr H would be provided with access to relevant information, and would have an opportunity to comment on it before any decision was made. Mr H was not at that time suspended from flying duties, and his employment was not terminated. I do not consider that the decision as conveyed in that letter suggest an absence of good faith under s 4(1A).

[110] Some reliance is placed on the fact that the allegations were "stale", although no details of either general or specific prejudice were given. As mentioned earlier, the alleged incidents were said to have occurred between 2005 and 2010. The fact that an allegation of inappropriate behaviour arose some years previously does not in and of itself necessarily preclude the possibility of investigation, or mean that a process of doing so would necessarily be unfair. However, were it to become evident in the course of an investigation that having regard to the response given by an employee the circumstances were such that the employee was prejudiced in the preparation or conduct of his response by the lapse of time, then it might become unfair to continue the investigation. That is a factor which could fall for

consideration after any response has been given. But a decision to investigate behaviour of the kind alleged in this case is not in my view automatically ruled out by the lapse of time which occurred in this case.

[111] Nor am I persuaded that the steps which A Ltd proposed to undertake could be regarded as a breach of the mutual obligations of good faith under s 4(1)(a). There is, for example, no evidence of an intention to mislead or deceive; nor was the decision to investigate one which was likely to mislead or deceive Mr H. I do not accept the submission that A Ltd misunderstood the nature of its obligations; nor do I consider that the decision, with its clear description of the intended process, could be said to demonstrate predetermination.

Conclusion as to first personal grievance

[112] I dismiss the first personal grievance raised for Mr H. I am not satisfied that the decision to investigate was unfair, in breach of the relevant provisions of the CEA, or amounted to a breach of the duty of good faith. It was a decision which a fair and reasonable employer could have reached in the circumstances.

Second and fourth grievances: decision to suspend and/or failure to reinstate Mr H

Suspension provisions of CEA

[113] Mr Harrison submitted that Mr H had been suspended purportedly "from flying duties" but given he had not been required to do anything else, or to attend work, he was effectively suspended from 5 December 2014. As I have already observed, in-house counsel for A Ltd used such a description.

[114] The evidence was that Mr H received that letter on the evening of 4 December 2014, via email. The next day, Mr McCabe sought and obtained an extension of time to 5.00 pm that day.

[115] The response he then gave made the point that Mr H had been caught by surprise, and had not been given sufficient time or information to comment on the proposal to remove him from flying duties.

[116] Mr McCabe stated that although the letter of 20 October 2014 had said there would be a meeting to discuss the option of suspension, no such meeting had in fact been held.

[117] Mr McCabe's response also referred to the fact that immediately upon receipt of the letter proposing stand-down (at 4.21 pm on 4 December 2014), Mr McCabe had requested correspondence, emails, memoranda, file notes, minutes and any other information held by A Ltd and its employees or agents, by return email. That information had not been provided by 5 December 2014, although the request had been acknowledged.

[118] Next, Mr McCabe stated that the time limit provisions of cl 3.9.1 precluded the company proceeding on the basis of information it held, since the information had not been forwarded within 14 days of receipt. Consequently there was no justification or grounds to remove Mr H from flying duties.

[119] Then Mr McCabe stated that Mr H was rostered for simulator sessions over the next two days and that he had successfully completed a simulator exercise that morning to a high standard, that he was fit and that he needed to continue training so as not to be disadvantaged when returning to line flying. It was submitted that it would be appropriate for the parties to attend mediation before any decision to remove him from flying duties was made.

[120] It was submitted that the decision to suspend was a knee-jerk reaction to what had occurred at the training session attended by Ms A and Mr H the previous day, and was prompted by the need to see if Ms A could be persuaded to maintain her allegations by being seen to take her concerns seriously.

[121] That evening, Mr Paine conferred with in-house legal counsel and as already described, wrote to Mr H advising of his decision to stand down. In-house counsel wrote to Mr McCabe confirming the intended process for investigation; that the request for information was broad-ranging and would take "some time" to compile but that all relevant information would be provided before any interview; and that A Ltd was prepared to attend mediation.

[122] Mr Paine was asked to explain why the decision to suspend was taken without the convening of a meeting with Mr H. He said that he needed to act in a "swift and effective way", given that Mr H was about to commence flying aircraft on the following Monday, and he was someone who was "under some form of duress or pressure from a proposed allegation …" whom he did not "… necessarily want in an aircraft".

[123] In response to a question founded on the fact that Mr H had been aware of Ms A's concerns since August 2014 and had known since October 2014 that an investigation was to be undertaken, Mr Paine said that nonetheless Mr H might have been affected by the advancing of the investigation. He said he did not want to expose Mr H, the business or the travelling public to any risks that might have arisen. While it would have been ideal to have met with Mr H and Mr McCabe to discuss these issues, he felt he needed to make an immediate decision before simulator training continued the next day.

[124] A Ltd had prescribed procedures and guidelines (the Policy) for the purposes of discipline. That document emphasised that a fair and proper procedure was a key legal requirement when disciplinary processes were undertaken. In respect of suspension, the Policy stated at cl 4.2.3:

> In cases of serious misconduct e.g. misappropriation of employer property, assault or breaches of safety rules and regulations employees may need to be suspended from work during the preliminary investigation. Such suspension is always on pay and should be preceded by an interview or discussion with the employee, informing the employee that suspension is being considered, the reason for this, and seeking any comments from the employee. Also the employee should be given the opportunity for representation.

[125] Mr Harrison relied on this provision, and also on the general duty of good faith under s 4 of the Act, as well as the requirements of procedural fairness which are inherent in the s103A test of justification.

[126] First, he submitted that the decision to suspend Mr H was taken in breach of A Ltd's Policy for dealing with suspensions in cases of serious misconduct. Mr Paine had not considered Mr H's circumstances and interests by reason of the fact that he was a beneficiary for an order of reinstatement, had already been

excluded from his chosen career as an airline pilot for over a year, had been undergoing requalification and was on the verge of recommencing flying duties. After obtaining Ms A's statement, Mr Paine had "immediately considered" whether A Ltd should propose that Mr H be removed from flying duties while the investigation continued. He wrote to Mr H the same day asking for comments not on Ms A's statement, but in respect of the proposal to remove Mr H from flying duties.

[127] In summary, Mr Harrison submitted the decision to suspend was a knee-jerk reaction to the incident involving Ms A the previous day which had precipitated her to withdraw the written statement which she had only just signed.

[128] For A Ltd, Mr Caisley submitted that Mr H was not suspended; he was removed from flying duties as provided for under the CEA. As such, A Ltd exercised a right provided for in the collective agreement; the complaint made by Ms A was potentially serious and could have affected health and safety. A Ltd had an obligation to ensure the health and safety of its staff, and to ensure a safe flying operation. Had Mr H remained in the workplace, there was a risk that he would meet Ms A there, potentially affecting the investigation process.

[129] Mr Paine was also asked to comment on the proposition that the time constraints were somewhat self-inflicted by A Ltd, since Ms A had provided an unsigned statement in December 2013, and no further steps had been taken since, particularly after the notification in October 2014 that the matter would be advanced. Mr Paine said that he had acted, he considered, in a timely way and as best he could.

Procedural flaws

[130] I consider there were significant procedural flaws with regard to the decision to suspend.

[131] A Ltd had set about the process of reinstating Mr H in a logical and staged fashion, as from 5 November 2014. The plan for his return to work indicated the retraining steps which would be undertaken, with simulator duties commencing on 1 December 2014 and line training commencing on 8 December 2014.

[132] Although a decision had been taken to advance the investigation concerning Ms A and others well prior to the training programme, in fact on 20 October 2014, there was little substantial progress until very shortly before Mr H was to resume line training and flying in early December 2014. A Ltd must bear responsibility for the decision not to have advanced the investigation earlier. This led to a pressured decision being made without adherence to the process envisaged by the CEA, and without proper consideration of all relevant factors.

[133] Next, although the decision to schedule both Ms A and Mr H on the same training programme on 4 December 2014 was inadvertent, it had predictable consequences and led to Ms A asking that her statement be withdrawn. That statement was being relied on for the decision to suspend. The decision not to disclose this development, and to continue to rely on the statement for the purposes of the decision being made in the hope Ms A could be persuaded to change her mind, was unfair. The implication of Ms A's wish to withdraw her statement was a matter on which Mr H was entitled to comment, since the statement was at the heart of the decision to suspend.

[134] That is not to say that A Ltd could no longer rely on the statement. It is clear the statement was not withdrawn because the author had any concerns as to its accuracy. Rather, the evidence establishes that Ms A did not want to face any consequences arising out of her information being relied on by the company for the purposes of the disciplinary process involving Mr H.

[135] As Mr Caisley submitted, there are several potential outcomes. Mr H might agree that the matters contained in the statement are correct; or he might contest them. If Mr H's account is contested, having regard to the totality of information A Ltd either has or is able to obtain, it might be the case that there is a conflict of evidence which is incapable of resolution, so that a fair and reasonable employer could not conclude that there was a basis for taking disciplinary action.

[136] Given the nature of Mr H's role as a pilot, the nature of the workplace in which such a pilot is required to work, and the nature of the allegations, I do not

consider that A Ltd was precluded from maintaining its investigation, given the wishes expressed by Ms A.

[137] However, the circumstances had altered significantly because Ms A did not wish her complaint to be advanced; it behoved A Ltd to discuss whether suspension still required consideration in the altered circumstances, even if it hoped that Ms A might subsequently agree to maintain her complaint.

[138] I consider Mr H was entitled to be informed of the development, and offered the opportunity to provide a response if he chose to do so.

[139] Finally, I consider that the failure to meet with Mr H before making the relevant decision was also a procedural error. There was a clear expectation of such a meeting, both from the initial notification given to Mr H in October 2014, and in the Policy. A meeting would have enabled the relevant issues, including those I have just discussed, to be canvassed fully and properly. It would have also enabled an assessment to be made as to whether there was any actual risk involved in permitting Mr H to complete his training and commence line flying duties. Instead, an assumption was made without input from Mr H.

[140] The pressured decision to stand Mr H down from flying duties was not a step which a fair and reasonable employer could have made in the circumstances.

Clause 3.9.1

[141] It was argued that cl 3.9.1 precluded reliance on Ms A's signed statement; this was on the basis that it was to all intents and purposes the formalising of an adverse report which had been provided to A Ltd in late 2013, and alluded to in the letter of 20 October 2014. I touched on this issue earlier.[21] In my view, Ms A's signed statement was different in material respects from the unsigned document which was produced in December 2013. It constituted an "adverse report", and it was provided to Mr H within 14 days of receipt.

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[21] At para [101].

[142] Next, it was submitted by Mr Harrison that the decision to remove Mr H from flying duties was based on an unfair and unreasonable decision to investigate. I have already dismissed this allegation so that this issue is not relevant to a decision to suspend.

Breach of order of reinstatement

[143] Mr Harrison submitted in summary that the decision to suspend and the fact of suspension were wrongful and unjustified because they placed A Ltd in clear breach of the (unvaried and unstayed) order for Mr H's reinstatement to his former position, which necessarily involved a resumption of his previous flying duties.

[144] Mr Caisley in response said that there was no evidence at all of disobedience on behalf of A Ltd. Mr H had been reinstated, which meant that all the rights and obligations of the parties' employment relationship resumed.

[145] I agree. As I have already commented, the first judgment did not preclude the possibility of the investigation being continued, although it would need to be the subject of proper processes. The employment relationship resumed, and it was subject to the rights and obligations attaching to such a relationship, including those described in the CEA, relevant policies, and in statutory obligations. I do not consider that matters I have reviewed indicate that A Ltd has not complied with the Court's directions.

Conclusion as to second and fourth personal grievance

[146] The second personal grievance, relating to the decision to suspend Mr H and then to suspend him, is upheld on the basis that the process followed by A Ltd was not one which a fair and reasonable employer could have undertaken in all the circumstances. There was no breach of the Court's order, so the fourth personal grievance is dismissed.

Remedies

[147] As to remedies, I deal first with the successful personal grievance relating to the unjustified suspension.

[148] Mr H claims lost wages. Although the Court was informed that Mr H was suspended on pay, there is an issue as to whether he should have been credited with his original rostered incentive hours for the four-week roster from which he had been suspended.[22] There is a dispute as to the proper interpretation of the clause dealing with pay for a pilot who is stood down. It is unnecessary for the Court to resolve this issue, because I have found that Mr H was unjustifiably suspended. The relief in respect of lost wages is the remuneration he would have earned, had he not been removed from flying duties. If he has not in fact been paid incentive pay since suspension, but would have received it had he been flying for the period of the suspension, he is entitled to that sum. The parties are to confer as to that issue; I reserve leave to apply for further directions if need be.

[149] Next, Mr H seeks compensation for hurt and humiliation under s 123(1)(c)(i) of the Act, in the sum of $50,000.

[150] Little evidence was provided on this topic. Mr H said that the matters which he had faced over the course of reinstatement had been "very difficult". Mr H also said that he had attended counselling to "help me cope with the stresses of my dismissal and suspension after reinstatement". He said that this continues. He had also utilised A Ltd's Employee Assistance Programme. No evidence has been provided from any third party such as a professional who has assisted Mr H.

[151] I recognise that any sum awarded should not represent punishment for the flawed decision to suspend, but compensation for impact of the grievance on the employee.[23] This is not a situation where financial pressures have exacerbated the effect on a employee who establishes a grievance; Mr H has been paid for the period of the dismissal.

[152] I take into account the significant period of the suspension which is one year and five months.

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22 Clause 13.3.3.5.

23 *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334.

[153] I consider a fair amount of compensation in the circumstances, given the limited evidence which is available to the Court, is $6,000.

[154] I am required to consider whether there should be any deduction from the financial awards. Mr H's actions did not contribute to the suspension which was unjustified on procedural grounds, and I accordingly do not need to reduce the financial remedies for contributory behaviour under s 124 of the Act.

[155] Turning to the counter-claim/claim brought by A Ltd, I declare that A Ltd is not prevented by cl 3.9.1 from proceeding with its investigation in reliance on the adverse reports:

a) provided on 8 August 2014 and referred to in Mr Pearce's letter of 20 October; and

b) 4 December 2014.

[156] I also declare that the adverse reports provided on 6 January 2015 are not automatically precluded from consideration, but any alleged unfairness arising from their late provision will need to be considered by A Ltd in the context of any investigation into the matters referred to in those statements.

[157] I reserve costs. Counsel are invited to resolve costs issues directly; if agreement does not prove possible, a party seeking costs may do so within 21 days of the date of this judgment, and the other party may respond 21 days thereafter.

B A Corkill
Judge

Judgment signed on 10 May 2016 at 11.00 am