

Legal update - What does *A Ltd v H* really mean?

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The Court of Appeal's decision in *A Ltd v H* (Mr H) has attracted a lot of commentary – the theme being that employers can breathe easier when it comes to dismissal decisions. Certainly the Court confirmed that employers' decisions shouldn't be subjected to "minute and pedantic scrutiny", and that the proper approach is to assess overall whether the decision was fair and reasonable in all the circumstances.

There is a key message in there, but it is of more interest to lawyers and academics than employers and employees who deal with these processes in real time. *A Ltd v H* should not be seen as a licence to take shortcuts or as a sign that the rules have changed – far from it.

The facts

Mr H was dismissed after A Ltd found that Mr H's conduct breached its sexual harassment policy and amounted to serious misconduct. Ms C, a 19-year-old novice flight attendant, alleged that during a layover, Mr H, a 51-year-old pilot, "briefly almost stroked" her leg under a table at dinner, made an inappropriate comment when she said she felt like going for a swim, and entered her hotel room, sat on her bed and touched her leg in a sexual manner. Mr H claimed the touching was accidental and his dismissal was unjustified.

Employment Court

The Employment Court found deficiencies in A Ltd's investigation that resulted in Mr H being treated unfairly. In particular, it found that the decision to dismiss was not fair because the other witnesses were not tested as rigorously as Mr H. The Court said that a reliable assessment required investigations to be conducted in an even-handed way. The Court also found there had been disparity of treatment in the way Mr H had been treated by A Ltd and how A Ltd had treated another employee in similar circumstances four years earlier.

Court of Appeal

The Court of Appeal disagreed with the Employment Court's assessment of A Ltd's investigation. It said that, while a balanced approach is appropriate, the Employment Court effectively applied a rule requiring all witnesses to be questioned in the same way and with the same level of detail. This was said to be contrary to the statutory requirement that what is fair and reasonable must be assessed "in all the circumstances".

The Court of Appeal considered "the circumstances were all important in this case" and affected the extent of the inquiry required to be undertaken by A Ltd. In particular, it was common ground that Mr H had entered the novice flight attendant's hotel room, whom he had not met prior to the trip and sat on her bed under a blanket. Mr H had accepted that there were chairs he could have sat on in the hotel room and that touching occurred. The Court of Appeal observed that A Ltd was entitled to structure its investigation approach around the "inherent implausibility of an innocent purpose and accidental touching" in these circumstances.

The key difference in the accounts of Mr H and Ms C was their different views on whether the touching in the bedroom was accidental. A Ltd asked Ms C directly whether the touching was accidental, and there was no reason for A Ltd to push further when she said it was not. There were also changes in the level of detail that Ms C, and another witness, Captain B, gave on different occasions. The Court of Appeal said these were minor changes that did not call into question the reliability of the witnesses, as the substance of each witness's account as to the nature of the touching was consistent.

The Court also discussed the replacement by 'could' of 'would' in the section 103A test, which determines whether dismissal or any other action taken by an employer is justified. It said that the change was intended to recognise that there are a variety of ways of achieving a fair and reasonable result in a given situation, and that an employer's action should not be determined by a single standard of what an employer would have done. The Court also noted that the minimum requirements for a fair and reasonable process (section 103A(3)) were intended to ensure that minor technical defects in process would not be determinative (section 103A(5)).

The Court set aside the Employment Court's orders granting Mr H reinstatement, payment of wages and compensation. The case was referred back to the Employment Court to determine remedies in light of the disparity finding that wasn't appealed and more

recent allegations against Mr H.

Comment

The minor changes in the witnesses' accounts and the fact that they were not tested in the same way as Mr H did not make A Ltd's decision unlawful ultimately, but it had to go all the way to the Court of Appeal to prove that – at great cost no doubt.

So, while employers who are defending a personal grievance can take some heart from the Court's decision, employers need to recognise still that their investigation and decision-making will be scrutinised closely if challenged. In dismissals the stakes are high and so - understandably - is the standard against which employers will be judged.

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