IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 79
EMPC 14/2018
EMPC 47/2018

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
BETWEEN	PAUL HINES Plaintiff
AND	EASTLAND PORT LIMITED Defendant

Hearing:	23 March, 4 April, 9-13 April and 24 April 2018 (heard at Auckland, Wellington and Gisborne)
Appearances:	P McBride and F Lear (on 4 and 11 April 2018), counsel for plaintiff E J Brown, counsel for defendant
Judgment:	16 July 2018

JUDGMENT OF JUDGE J C HOLDEN

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[1] On the morning of 30 March 2017, the fishing trawler, *Seamount Explorer*, hit an ice tower on a wharf at Eastland Port, in Gisborne. Captain Hines was the pilot on duty at the Port. He was not on board the *Seamount Explorer*. Captain Hines' employer, Eastland Port Ltd (EPL), then found that Captain Hines had also not been on board the cruise ship, *Emerald Princess*, when it left the Port on 26 February 2017.

[2] EPL investigated these incidents and ultimately dismissed Captain Hines for serious misconduct.

[3] He challenges that dismissal and also challenges steps taken by EPL along the way.

[4] The key issues to be determined are:

(a) Whether it was open to EPL to find that the behaviour for which Captain Hines was dismissed amounted to serious misconduct.

(b) Whether the investigation and disciplinary process was sufficient, fair and reasonable in all the circumstances.

(c) Whether any defects in the process followed by EPL resulted in Captain Hines being treated unfairly.

(d) Whether EPL's decision to put Captain Hines under the supervision of Captain Kaye, who was the other pilot employed by EPL, from 5 April 2017 was an unjustifiable action causing disadvantage.

(e) Whether EPL's decision to relieve Captain Hines from vessel piloting duties from 19 May 2017 was an unjustifiable action causing disadvantage.

(f) Whether Captain Hines was dismissed or otherwise subject to a detriment because he had previously submitted a personal grievance to EPL.

(g) Whether, and to what extent, Captain Hines is entitled to indemnity costs pursuant to the indemnification clauses of his employment agreement.

(h) If Captain Hines was unjustifiably dismissed, and/or suffered a disadvantage because of EPL's unjustifiable actions, what the remedies are.

[5] For the reasons set out in this judgment:

(a) It was open to EPL to find that Captain Hines' conduct was serious misconduct in the circumstances.

(b) The investigation was sufficient but there were some defects in the disciplinary process.

(c) The defects in the process did not cause Captain Hines to be treated unfairly.

(d) EPL ought to have consulted Captain Hines before putting him under the supervision of Captain Kaye, but that was a minor defect and Captain Hines was not treated unfairly or disadvantaged by the decision.

(e) EPL ought to have consulted Captain Hines before relieving him from vessel piloting duties, but that was a minor defect and Captain Hines was not treated unfairly or disadvantaged by the decision.

(f) Captain Hines was not dismissed or otherwise subject to a detriment because he had previously submitted a personal grievance to EPL.

(g) Captain Hines is not entitled to indemnity costs pursuant to the indemnification clauses of his employment agreement.

(h) Captain Hines is not entitled to any remedies.

The context in which the Port operates

[6] Eastland Port is critical to the economic survival of the Gisborne region. It is the gateway for the East Coast forestry industry, with almost all the regional harvest being exported through Eastland Port.

[7] The safe operation of the Port is therefore of paramount importance to the local and regional economy, a responsibility EPL takes very seriously.

[8] The Port itself is relatively exposed to the open ocean, with a narrow entrance channel and a small turning basin that presents particular maritime challenges.

[9] In 2002, Eastland Port experienced first-hand a major national scale maritime incident when the *Jody F Millennium* became stranded off Waikanae Beach in Gisborne and remained there for 18 days while attempts were made to re-float her.

[10] In that situation, the poor decision-making of one of the Port pilots contributed to the stranding.

[11] The experience with the *Jody F Millennium* is part of the background against which EPL operates. Since that incident the Port operators, including EPL, have been focussed on ensuring nothing like that happens again.

The maritime context generally

[12] The Maritime Transport Act 1994 applies generally to ships navigating New Zealand waters. Section 60A(1) requires the master of a ship to ensure that a pilot is taken on board the ship in accordance with and whenever required by maritime rules. A "pilot" of a ship is any person, not being the master or member of the crew of the ship, who has the conduct of the ship.[1]

[13] If a ship proceeds without a pilot in contravention of s 60A of the Maritime Transport Act, the owner and master of the ship each commits an offence.[2] Mr Burton, who gave expert evidence for EPL on maritime law, said that, arguably, a pilot may also commit an offence under s 65 of the Maritime Transport Act if he or she purports to commit a ship to enter or leave a pilotage area without a pilot on board, in contravention of the relevant rules.

[14] The relevant rules applying to pilotage are found in Part 90 of the Maritime Rules[3]. Rule 90.23(2)(b) generally requires the master of a ship that meets or exceeds any limits specified for a pilotage area[4] to ensure that, when navigating in a pilotage

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1 Maritime Transport Act 1994, s 2, definition of **pilot**.
2 S 65A(1).
3 Maritime Transport Rules Part 90, made under the Maritime Transport Act, s 36A; <www.maritimenz.govt.nz/rules/part-90>.
4 The specified limit for Eastland Port is 500 gross tonnes.

area, the ship either carries a pilot who holds a current, appropriate pilot licence, or receives advice from a pilot that:

(i) the pilot is unable to transfer to or from the ship safely; and

(ii) in the opinion of the pilot, the movement of the ship within the pilotage area can be completed safely, with the pilot's advice.

[15] Rule 90.23(6) provides an exception to Rule 90.23(2) where the ship is transiting between the perimeters of the pilotage area and a designated pilot boarding station or anchorage within that pilotage area, with the prior approval of a pilot. Such approvals must only be given in accordance with the pilotage provider's Standard Operating Procedures (SOPs) and may not be appropriate in all pilotage areas or circumstances. Where adopted, such arrangements must be agreed between the pilotage provider and the harbourmaster.

[16] EPL's overriding principles in relation to pilotage are set out in its SOP 7. This SOP states that the pilot's primary duty is to provide local ship handling expertise and accurate local information to ensure the safe navigation of the ship. In practice, the pilot will control the ship on the master's behalf. SOP 9 covers the master-pilot responsibilities and provides that the navigation of a vessel in the Gisborne pilotage district is a shared responsibility between the pilot, the vessel's master and the bridge team. SOP 9 confirms that Gisborne is a compulsory pilotage area and that the pilot is required to direct the navigation of the vessel, subject to the master's overall command.[5]

[17] SOP 36 specifically applies to cruise ships at anchor in Eastland Port and provides that the maritime manager/duty pilot, liaising with the harbourmaster, will decide if pilotage is required from the pilotage limit to the designated anchor position.

[18] There has been considerable evidence from professionals and experts working in the maritime environment. I am grateful to each of those witnesses for their assistance.

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5 The SOP confirms that, except where the pilot is manifestly incompetent or incapacitated, or the vessel is in extremis due to the pilot's actions, the master and bridge team must co-operate closely with the pilot.

Pilots employed for expertise

[19] EPL employs two pilots. At the relevant time, these were Captain Hines and Captain Kaye, who worked opposite shifts. EPL competes on an international market for experienced and qualified pilots, which means that their terms of employment at EPL are comparable to pilots in other ports, even though Eastland Port is not a busy port.[6]

[20] Pilots have particular expertise not held by others at EPL. One of their principal accountabilities is to carry out pilotage duties in accordance with maritime rules and with EPL's SOPs. In the normal course, when a vessel that meets or exceeds the 500 gross tonne limit for Eastland Port arrives at or leaves from the port, the pilot on duty is expected to be on board, providing pilotage for most, if not all of the vessel's transit through compulsory pilotage waters.

Seamount Explorer arrives without a pilot on board

[21] The *Seamount Explorer* is a fishing trawler of 671 gross tonnes.

[22] Prior to its arrival, there were discussions between Mr Craw, EPL's Port Services Manager, and the owner of the *Seamount Explorer*, regarding requirements for pilotage for the *Seamount Explorer*.

[23] Mr Craw advised the owner that, as the *Seamount Explorer* was over 500 gross tonnes, it would need a pilot unless it had an exemption. Mr Craw then spoke with Captain Hines who undertook to discuss the situation with Captain Magazinovic, the Gisborne harbourmaster, at a meeting already scheduled for later that morning.

[24] At that meeting, the arrival of the fishing vessel was referred to informally, along with several other topics. Captain Magazinovic was adamant that he was not advised that the fishing vessel was above the specified limit for Eastland Port. Another vessel – the *Anatoki* – was used as a comparator. Captain Magazinovic makes the

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6 Eastland Port has around 150 vessels per annum that come in and out of the Port. By way of comparison, the port at Tauranga has around 1500 such visits per annum.

point that, if the *Seamount Explorer* was above the specified limit, there was nothing to agree – he cannot sanction the non-pilotage of a vessel that is over the specified limit. I accept that Captain Magazinovic agreed that a sensible approach was for Captain Hines to observe the arrival of the *Seamount Explorer* from the wharf, and provide advice if required. However, this was on the understanding that the vessel was below the specified limit but that Captain Hines had some concerns about the draft of the vessel.

[25] After his discussion with Captain Magazinovic, Captain Hines advised Mr Craw that the *Seamount Explorer* could come in without a pilot. As a result, Mr Craw advised the owner that Captain Hines had negotiated a pilot exemption so there should be no impediment to the trawler entering the Port to discharge fish at the Moana Pacific ice tower berth on wharf 6. Mr Craw assumed that a pilot exemption had been granted by the harbourmaster; his understanding was that this was the only basis upon which a vessel, over the specified limit, could come in without a pilot. Pilot exemptions cannot be "negotiated" as the email suggested; there is a training regime and then Pilot Exemption Certificates are issued by Maritime New Zealand. Captain Hines was copied in on that email. This message was passed on to the captain of the *Seamount Explorer* and he therefore traversed the pilotage area and berthed at wharf 6. In the process of berthing, the bow of the *Seamount Explorer* hit the ice tower on wharf 6 causing damage to part of the shute.

[26] Captain Kaye recalled that, later that day, Captain Hines advised him that the harbourmaster had said it would be okay for the vessel to come into port without a pilot as long as the pilot was standing on the wharf with a radio. Captain Kaye recalls Captain Hines adding "and I did".

The departure of the *Emerald Princess* was also without a pilot on board

[27] The *Emerald Princess* made its first visit to Eastland Port on 26 February 2017. Captain Hines was the pilot on duty and piloted the *Emerald Princess* in to the inner anchorage at Eastland Port. This anchorage was established in late 2015 and was close to Waikanae Beach in Gisborne. EPL has now removed the inner anchorage.

[28] After piloting the *Emerald Princess* into port, Captain Hines was satisfied that it was safe and appropriate for the *Emerald Princess* to depart the anchorage directly for sea that evening, without a pilot on board. He says he reached that view considering that the *Emerald Princess* is a modern, very highly manoeuvrable ship, that the captain of the *Emerald Princess* and his team were competent with excellent operational equipment and an extremely capable and highly functional bridge team, and that the expected weather at the time of departure was good. Captain Hines discussed this proposal with the captain of the *Emerald Princess*, and agreed that, if the captain was happy to depart without a pilot, he could do so. Captain Hines provided the captain with his business card. The arrangement does not seem to have been formally noted and others in the bridge team were not aware of it. They tried to contact Captain Hines prior to departure but were unable to.

[29] The sea conditions deteriorated somewhat over the afternoon so that when the *Emerald Princess* departed there was a slight chop. The *Emerald Princess* left a little later than scheduled, but without incident.

EPL commenced an investigation

[30] On Friday 31 March 2017, after EPL's General Manager, Mr Gaddum, heard about the arrival of the *Seamount Explorer* without a pilot on board, he emailed Captain Hines saying he was:

> ... wondering why the fishing vessel the Seamount Explorer entered the port without a pilot on-board. From what I can tell the vessel has a gross tonnage of 671 tons.
>
> Clearly this is outside the 500 ton limit imposed under Part 90.

[31] Captain Hines replied that evening advising Mr Gaddum that the vessel berthed under the supervision of a pilot and the arrival was discussed and authorised by the Gisborne harbourmaster in a meeting prior to the vessel's arrival.

[32] The following Monday, 3 April 2017, Mr Gaddum sent another email to Captain Hines advising him that he needed to understand further why the vessel was not physically piloted into port given its size, and why a dispensation was sought from the harbourmaster.

[33] He advised Captain Hines that, on the face of it, EPL may have breached an important Maritime New Zealand rule, which made Mr Gaddum very uncomfortable without further information. He advised Captain Hines that he had asked Mr Gordon to "look into it" with the support of Captain Kaye and Mr Moroney. Mr Gordon is the Health, Safety and Environmental Facilitator, and Mr Moroney is the General Manager of People and Performance at EPL.

[34] Captain Hines telephoned Mr Gaddum and told him that he thought that observed pilotage was acceptable under the Rules but that he would review his understanding. He accepted that he could have handled the berthing of the *Seamount Explorer* differently, and would do so in future (Mr Gaddum's recollection is that the words used were "more professionally" but nothing turns on that as the implication in Captain Hines' recollection is the same).

[35] Later that day Mr Gaddum became aware that the *Emerald Princess* had earlier departed without a pilot. This came to his attention because Captain Kaye showed him an email trail from Princess Cruises asking for confirmation of whether it was required to take a pilot on departure from Gisborne. The email from the first officer of the *Emerald Princess* went on "last time the pilot did not show up after repeatedly trying to get hold of him, and so the vessel was forced to leave without the pilot and after a lengthy delay". The email had been sent to a number of Princess Cruises email addresses and Mr Gaddum was concerned that Princess Cruises might see EPL as an unprofessional "mickey mouse" operation that did not know what it was doing. He said he felt embarrassed by the query.

[36] With the two alleged non-pilotage incidents occurring so close together, both involving Captain Hines, Mr Gaddum decided the situation needed to be considered further.

[37] On 6 April 2017 Mr Gaddum met with Captain Hines. Both Captain Hines and Mr Gaddum agree that Mr Gaddum was livid. Captain Hines assured Mr Gaddum that he would act differently in future if any similar circumstances arose. Mr Gaddum's recollection is that Captain Hines said that he thought that he had been in breach of Part 90; Captain Hines' recollection was that he said he would take some advice about

the Rules and whether he had (inadvertently) breached them. Towards the end of the meeting, Mr Gaddum provided Captain Hines with a letter dated 5 April 2017. The letter confirmed to Captain Hines that the incident involving the *Emerald Princess* was also now under investigation as, on its face, it was very similar in nature to the *Seamount Explorer* incident. The letter went on "It is important to note that this investigation is both a health and safety and a disciplinary investigation".

[38] That letter also advised Captain Hines that Mr Gaddum had decided that:

> Given the serious nature of these alleged incidents and your own admission I am left with little choice but to put you under supervision while these investigations are carried out. Your supervisor over this period will be Captain Chris Kaye. I would expect that Chris will have full oversight of your pilotage duties during the supervisor period pending the outcome of the investigations currently being undertaken.

[39] This proposed course of action had not been discussed at the meeting.

[40] After the meeting of 6 April, Captain Hines went to see Mr Moroney. Captain Hines advised Mr Moroney that he wanted to discuss the letter dated 5 April and that he thought he had grounds for a personal grievance. Mr Moroney did not consider that Captain Hines was actually raising a personal grievance and Captain Hines did not take the matter further at that stage.

[41] During April, the investigation into the two incidents proceeded. This was largely carried out by Mr Gordon who obtained some input from Mr Moroney and Captain Kaye.

[42] Mr Gordon's report was into the circumstances of the two incidents. In the course of his investigation there were interviews with Captain Hines, Captain Kaye, Mr Craw, and Captain Magazinovic; and information was obtained by email from Maritime New Zealand, and from Princess Cruises and its shipping agent. Mr Gordon also obtained weather and sea condition information, stills from various cameras around EPL, purchase records for fuel for the vehicle that Captain Hines used, and documentation regarding the arrival and departure of the two vessels in question.

[43] The camera stills did not support Captain Hines' version of events, and the fuel purchase records did not record any fuel purchase for the time in question.

[44] While Captain Hines has expressed concern about the appropriateness of Mr Gordon being the investigator, given his lack of maritime knowledge or experience, he accepts that the notes taken of the discussions he had with Mr Gordon indicate the general course of the discussion. Captain Hines raises some examples of what he says are errors in Mr Gordon's report.[7] He also complained about Mr Gordon's interviewing style. He is particularly concerned about an exchange that took place between Mr Gordon and himself in relation to Captain Hines' position when he says he was observing the berthing of the *Seamount Explorer*. His complaint is, first, that Mr Gordon was both interviewer and witness in that regard and, second, that he had a sense that Mr Gordon was being argumentative and trying to get Captain Hines to answer questions that he had already answered. The notes record a first exchange about the arrival of the *Seamount Explorer*[8]:

> Hines: Thursday observed vessel transit channel and berth "beautiful job", "nothing wrong with it"
>
> In situ berth 6 radio in hand
>
> Had couple lines secured fore and aft left for office
>
> Arrived same time as you [John Gordon]
>
> Gordon: You were on wharf observing it
>
> Hines: On roadway. You must have [passed] me [John]
>
> Gordon: How did you watch it come in
>
> Hines: On my phone from in the car

[45] A little later in the interview there was a further exchange:

> Gordon: You aware vessel collided with ice tower
>
> Hines: No
>
> Gordon: Why didn't you see it if you were observing it

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7 He says it was Mr Craw who first raised the $150 cost; points out that a discussion was around a "berthing" process and not a "birthing" process; and that the reference to "AOS" in the report ought to be "AIS".

8 There are three sets of notes. The extracts are from the contemporaneous handwritten account.

Hines: I didn't see it

Gordon: (Shows pictures of damage)

Hines: He wasn't in that position when I left him, he was basically along side

Gordon: He only came along side after damage happened

Hines: I beg to differ because when [I saw him], he was on good approach

Gordon: You stand by the fact you observed from the road

Hines: I observed the vessel

Gordon: From the road is that right

Hines: I'm not repeating myself

Gordon: Beg to differ cause you came out in front of me from Crawford Road. I didn't pass you stationary on road observing

Hines: Cause I just filled up with gas (you can have a look at my tank if you want its full)

[46] At a subsequent meeting, on 12 April 2017, Captain Hines responded to the typed-up notes of the previous interview. In relation to the exchange recorded above, he added that he had used the pump at the truck stop on Crawford Road but that he could not recall if he got fuel or not "because pump six plays up sometimes". He did not dispute that Mr Gordon had seen him coming out of Crawford Road but said that he was coming from the Caltex truck stop.[9]

Report provided to Mr Gaddum and Captain Hines

[47] Once he had completed his report, Mr Gordon provided it to Mr Gaddum, who then wrote to Captain Hines, enclosing the report and inviting him to attend a formal disciplinary meeting.

[48] In his covering letter of 9 May 2017, Mr Gaddum advised Captain Hines that the meeting would give him an opportunity to provide his explanations and to

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9 Captain Hines' route from home to the Port includes passing a dairy on De Lautour Road, then driving down Crawford Road to where it meets Kaiti Beach Road, turning left into Kaiti Beach Road and then proceeding to the Port offices. There is a Caltex truck stop on the corner of Crawford Road and Kaiti Beach Road. The distance from the dairy to the Crawford Road/Kaiti Beach Road intersection is 1.7 kilometres, about a 3-minute drive.

comment on the factual background, including whether he was rostered on duty when the *Emerald Princess* departed Eastland Port without a pilot, and when the *Seamount Explorer* entered into port without a pilot. Mr Gaddum noted that the *Seamount Explorer* attempted to berth at wharf 6, but had difficulty positioning itself alongside the wharf and the bow collided with the Moana Ice Tower, causing damage to the ice conveyor.

[49] The letter from Mr Gaddum set out a number of allegations. The first allegation was that Captain Hines had:

> i. Failed to act in the best interests of the company by:
>
> a) Not complying with Maritime Rules Part 90 and not piloting the Emerald Princess and Seamount Explorer vessels, which made them a potential hazard in a high risk safety sensitive workplace;
>
> b) Not assisting the Seamount Explorer, which resulted in the vessel colliding with the Moana Ice Tower, causing damage to the ice conveyor.

[50] The other allegations flowed out of the same two non-pilotage events and included:

- failing to exercise good judgement;
- breaching the Company code of conduct policy, including by acting negligently by not piloting the two vessels;
- breaching the Company health and safety policy;
- acting in a manner that undermined or had the potential to undermine the Company's reputation as an employer, committed to providing and maintaining a safe and healthy work environment;
- acting in a manner that negatively impacted on the employment relationship and on the Company's reputation externally with its clients, port users, maritime authorities and harbourmaster;
- acting in a manner that could have compromised the Company's health and safety obligations and opened the Company up to the risk of prosecution from Maritime New Zealand and WorkSafe; and
- acting in a manner that negatively impacted on the essential trust and confidence in their employment relationship.

[51] The letter acknowledged that these were only allegations at that stage but said that EPL viewed them as very serious, and if Mr Gaddum was satisfied that they were found to have been established, an outcome of the disciplinary process could be a sanction up to termination of Captain Hines' employment for serious misconduct.

[52] When Captain Hines came back to Mr Gaddum on 12 May 2017, suggesting the events be dealt with as a learning exercise, consistent with his understanding of a "No blame Culture", Mr Gaddum confirmed that it was a disciplinary process to decide if Captain Hines' conduct amounted to serious misconduct and if so what disciplinary sanction would be appropriate in the circumstances. Mr Gaddum advised:

> The allegations are considered serious, therefore the sanction could be a warning up to termination of the employment relationship. I have not made any decision yet on what the outcome will be. It is entirely up to you how or if you wish to respond to the concerns and allegations that have been raised.

Disciplinary meeting held on 17 May

[53] Captain Hines met with Mr Gaddum and Mr Moroney on 17 May 2017. No formal record of the meeting was available for the hearing. There was (and is) no dispute that Captain Hines was rostered on duty when the *Emerald Princess* departed Eastland Port without a pilot, and when the *Seamount Explorer* entered into port without a pilot. At the meeting, he gave an account of his movements on the morning the *Seamount Explorer* arrived, said he observed it remotely, and provided his explanation of inconsistencies between his account of the morning the *Seamount Explorer* arrived and the Port's CCTV footage. He said it was permissible under the Rules for the *Emerald Princess* to depart without a pilot. Captain Hines also advised Mr Gaddum of the inquiries he had made, including some of the responses he had received.

[54] After hearing from Captain Hines, Mr Gaddum was concerned with perceived inconsistency in Captain Hines' explanations, Mr Gaddum says, for example:

(a) Captain Hines said at the meeting of 17 May that he had told Mr Craw that the *Seamount Explorer* "probably doesn't need a pilot", which was at odds with his earlier statement that he said a pilot was required;

(b) Captain Hines initially said he was on the number 6 wharf with a radio in hand when the *Seamount Explorer* arrived, but then changed to that he was parked on Kaiti Beach Road above the Port;

(c) Captain Hines said that the dairy owner saw him as he drove past his shop at 6.50 am, but CCTV footage showed him driving along the nearby Crawford Road at 7.51 am;

(d) his explanation for Mr Gordon seeing him exit Crawford Road onto Kaiti Beach Road was that he filled up with fuel, but then he changed that explanation to that he attempted to fill up with fuel, unsuccessfully; and

(e) he first said he left the fuel stop by one exit, but after the CCTV footage did not corroborate that, changed to that he left via an alternative exit further up the road (which the CCTV footage also did not align with).

[55] Another issue that came up at the 17 May meeting was in relation to an audit report being prepared by Maritime New Zealand (the SMS audit report).

[56] Captain Hines had been the EPL person involved with the working group and had received a draft of the SMS audit report. Mr Gaddum asked Captain Hines for a copy of the SMS audit report the day before the meeting of 17 May, and Captain Hines advised that he had not received one. When Mr Gaddum sourced the SMS audit report elsewhere, he found that it included an erroneous statement in relation to the *Seamount Explorer* that financial issues were the main cause for the failure to embark a pilot. This reinforced Mr Gaddum's view that Captain Hines was being deceitful in not providing the draft SMS audit report.

[57] Captain Hines' position with respect to the SMS audit report was that he did not consider he was able to provide the draft report to Mr Gaddum because it had been

sent on a confidential basis, and, further, he had understood Mr Gaddum to be seeking a copy of the final SMS audit report, not the draft. He notes that, at a meeting on 11 May 2017, attended by Mr Gaddum, he had advised that a draft report had been received.

[58] Ultimately, although these issues of inconsistency and perceived deceit were of concern to Mr Gaddum, the key point for him remained that Captain Hines was not on board the *Seamount Explorer* when it came into Port; nor was he on the *Emerald Princess* for its outbound movement.

[59] On the afternoon of Friday 19 May 2017, Mr Gaddum gave Captain Hines a further letter in which he set out what he described as his "findings". Mr Gaddum said he was satisfied that the allegations made in the previous letter had been established. The letter also goes through other concerns that Mr Gaddum had, including the inconsistencies between what Captain Hines was saying and the other material available, the failure to provide a copy of the draft SMS audit report when asked, and what Mr Gaddum saw as a lack of remorse or appreciation of the potential impact of Captain Hines' actions.

[60] Mr Gaddum concluded that Captain Hines' behaviour amounted to serious misconduct.

[61] Captain Hines was invited to a further meeting for him to put forward any new comments or information he wanted Mr Gaddum to consider before he made a decision on the outcome.

[62] The letter also advised Captain Hines that, given that it was a very stressful time for him, and given the highly safety sensitive nature of his position, he was relieved from vessel piloting duties up until the meeting that was scheduled for Monday 22 May 2017 at 10.30 am. This meant that the anticipated period of Captain Hines' being relieved from vessel piloting duties essentially was the two days over the weekend. This relief from piloting duties coincided with Captain Kaye returning from leave.

[63] As it transpired, the meeting was put off because Captain Hines' representative was not available and so it took place on 26 May 2017. The relief from vessel piloting duties continued but Captain Hines was not on piloting duty at the time.

Meeting of 26 May not just confined to outcome

[64] The meeting on 26 May 2017 went beyond discussion of possible outcomes. It was a lengthy meeting – around three hours long - attended by Captain Hines and Mr McBride as his representative, and Mr Gaddum with Mr Moroney and Ms Barclay from EPL's human resources team.

[65] At the meeting Captain Hines went through again what he said took place with respect to both the *Emerald Princess* and the *Seamount Explorer*.

[66] He confirmed that he was still of the view that he had not breached the Maritime Rule 90.23 with respect to the *Emerald Princess* and that he thought he was right to allow it to depart without a pilot.

[67] With respect to the *Seamount Explorer*, he accepted that he had been in breach of the Rule. His explanation was that he had misunderstood the Rule and understood that non-pilotage was allowed if a pilot was unable to transfer to or from the ship safely *or* in the opinion of the pilot, the movement of the ship within the pilotage area could be completed safely, with the pilot's advice. In fact, the relevant provision requires both factors to be present.[10]

[68] He maintained that his presence on the *Seamount Explorer* would not have changed the ship handling because a pilot on a fishing vessel is not in control but is just giving advice. He also maintained that the breach of the Rules was minor. In relation to Captain Hines' location while the *Seamount Explorer* was coming in, he accepted that he might have replied that he was over by berth 6 with his radio but said that, in his later responses, he had simply become more precise. There was discussion regarding the CCTV footage.

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[10] Maritime Rule 90.23(2)(b); see para [14] above.

[69] There also was discussion regarding the SMS audit report, the relieving from pilotage duty of Captain Hines, and the conduct of the investigation. The meeting principally involved Captain Hines speaking and others listening.

Captain Hines is dismissed

[70] Mr Gaddum said that after the meeting he took a step back and went through all the information again.

[71] His evidence was that, at the core of everything, Captain Hines was not on board the *Seamount Explorer* or on the *Emerald Princess* piloting those two vessels as he was employed to do. He concluded that dismissal was warranted and advised Captain Hines of that by letter dated 31 May 2017. That letter went through Mr Gaddum's findings in relation to the two incidents, essentially that Captain Hines ought to have been on board both vessels and was not.

[72] Mr Gaddum also advised that he was satisfied that Captain Hines had been "completely dishonest" and was lying about his final position to "supervise" the berthing of the *Seamount Explorer*. Mr Gaddum said that Captain Hines' actions and statements, including Captain Hines' attitude and lack of awareness, had detrimentally impacted on the trust and confidence Mr Gaddum had to have in him. He said that Captain Hines had gone to great lengths to deflect attention from himself and to explain away his misconduct.

[73] Mr Gaddum also supplied some further photos from a Gisborne weather camera, which he said confirmed that Captain Hines had lied about the position he was in for the berthing of the *Seamount Explorer*.

[74] In conclusion, Mr Gaddum said that he was satisfied that, with Captain Hines' conduct, he had:

(a) failed to exercise the good judgement expected of a senior manager putting himself, others, and the Company in the position of unacceptable risk;

(b) acted in a manner that undermines or has the potential to undermine the Company's reputation as an employer that is committed to providing and maintaining a safe and healthy work environment;

(c) acted in a manner that has negatively impacted on the employment relationship and on the Company's reputation externally with its clients, port users, maritime authorities and harbourmaster; and

(d) acted in a manner that has destroyed the essential trust and confidence in their employment relationship.

[75] Mr Gaddum found that Captain Hines' behaviour amounted to serious misconduct and that the appropriate sanction was to terminate the employment relationship, effective immediately. He then exercised his discretion to pay Captain Hines one month's pay as a good faith gesture, along with his outstanding leave and time-in-lieu days.

EPL's actions have to be objectively justifiable

[76] Under s 103A of the Act, the Court must determine whether a dismissal or an action was justifiable by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Court may not substitute its own view for that of the employer. Rather it must assess the employer's actions against an objective standard.[11]

Issue 1: Was it open to EPL to find serious misconduct?

[77] Captain Hines submits that it was not open to EPL to find that his behaviour amounted to serious misconduct. In particular, he says:

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[11] *Angus v Ports of Auckland Ltd*, [2011] ERNZ 466 at [25]; *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 (EmpC) at [74].

(a) when he did not pilot the two vessels he was acting upon an honest belief that what he was doing was lawful;

(b) with respect to the *Seamount Explorer*, he had a genuine but mistaken view of the Rules, the breach was minor and not by Captain Hines;

(c) with respect to the *Emerald Princess*, Captain Hines' decision was in accordance with the Rules; and

(d) there was no proper basis to conclude there was any dishonesty on Captain Hines' part, either in relation to his explanations of his actions on the morning the *Seamount Explorer* came in to Eastland Port, or in relation to the provision of the SMS audit report.

[78] Captain Hines submits that acting upon an honest but mistaken belief is not misconduct (let alone serious misconduct). That submission overstates the position. As noted by this Court in *Minhinnick v New Zealand Steel Ltd*, the correct approach is that stated in the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan*.[12] That approach means that even one-off acts of inadvertence, oversight or negligence can, depending on the overall circumstances, amount to serious misconduct justifying dismissal. The Court is to stand back and consider the factual findings and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach. Thus, a careless act can lead to dismissal for serious misconduct, but the matter needs to be considered in light of all the circumstances and ultimately must revert back to the primary consideration to be made under s 103A of the Act.[13]

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12 *Minhinnick v New Zealand Steel Ltd* [2010] NZEmpC 30, [2010] ERNZ 73 at [25], citing *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [36].

13 *Minhinnick*, above n 12, at [27].

[79] Here the relevant circumstances included the role in which Captain Hines was employed, the terms of his employment agreement, Maritime Rules Part 90 and EPL's SOPs.

[80] Captain Hines was employed for his expertise as a marine pilot. The general manager had to be able to rely on him to exercise his professional judgement properly and competently. Captain Hines recognised this; in the chronology he provided during the investigation, he recorded that he had told Mr Gaddum on 5 April 2017 "that he had 2 good, well experienced and well trained pilots on the team and that he did not have to worry or concern himself with the safety of marine operations, as that is [their] primary role and [they] perform it well."

[81] Captain Hines' employment agreement noted that one of his principal accountabilities was to carry out pilotage duties on behalf of EPL. He also had principal accountabilities of ensuring compliance by EPL with all regulations and legislative requirements on an ongoing basis, and establishing and maintaining appropriate policies and procedures, where required, for the safe and effective movement of shipping within the Port and its navigational limits.

[82] There was no operational reason for Captain Hines not to pilot either the *Seamount Explorer* coming into Eastland Port or the *Emerald Princess* departing Eastland Port. His employment agreement required him to pilot the two vessels.

[83] Captain Hines' position was that he had a mistaken but genuine belief that remote pilotage of the *Seamount Explorer* was permitted by Part 90. He continues to believe that his actions with respect to the *Emerald Princess* were permitted by Part 90.

[84] Captain Hines points out, and I accept, that the obligation in Rule 90.23 is stated to be that of the master of the ship, and not the pilot. But I do not understand Captain Hines to be arguing that this meant he had no obligation to act consistently with the Rule, or that he could avoid responsibility where his actions resulted in or contributed to a breach of the Rule.

[85] Captain Hines' actions with respect to the *Seamount Explorer* should have been consistent with the Rule. His explanation that he misread the "and" in Rule 90.23(2)(b) for an "or", and therefore thought it was acceptable to advise the master that he did not require a pilot because the movement of the ship within the pilotage area could be completed safely, is surprising. Subpart B of Part 90 of the Rules, which covers pilotage requirements, and includes Rule 90.23, is at the heart of the responsibilities of a pilot. It was a reasonable expectation that Captain Hines thoroughly understood those obligations. The evidence of other witnesses demonstrated that it was well understood that, for pilotage not to be required, it must be unsafe for the pilot to transfer to the ship. That evidence was given by a range of witnesses, including several who were not as expert as Captain Hines was expected to be.

[86] In arguing that his non-pilotage of the *Emerald Princess* was permitted, Captain Hines relies on the exception in Rule 90.23(6) – that the *Emerald Princess* was transiting between the inner anchorage and the perimeter of the pilotage area. The evidence of Mr Burton was that, while the exception in Rule 90.23(6) allows for non-pilotage where the ship is transiting between the perimeter of the pilotage area and a designated pilot boarding station or anchorage within that pilotage area, the Rule does not envisage a ship traversing the pilotage area without a pilot at all. That is consistent with the evidence of Captain Kaye. Captain Bolt, who is an experienced pilot, currently employed by Port Otago as its General Manager, Marine and Infrastructure, and who gave evidence for Captain Hines, also noted that vessels navigate inside pilotage waters without pilots on board, but his evidence was directed to the situation where the pilot had not boarded immediately on entry to pilotage waters, or had left before the boundary was reached, rather than to situations where no pilot was on board at all. Captain Jackson, who is a marine pilot for the Port of Tauranga and also provides piloting services to EPL from time to time, also agreed that pilots are not always on board vessels that require pilotage, but again was talking of situations where that occurs close to the boundary of pilotage waters. Without determining the matter conclusively, it seems to me to be correct that Rule 90.23(6) is directed to those small periods without a pilot. Reading it as widely as Captain Hines reads it would render Rules 90.23(1) and (2) almost pointless.

[87] In any event, the exception in Rule 90.23(6) requires that the pilot's approval must be given in accordance with the pilotage provider's SOPs and must be agreed between the pilotage provider and the harbourmaster. SOP 36, which applies to cruise ships at anchor at Eastland Port, says that "The Marine Manager/Duty Pilot liaising with the harbourmaster will decide if pilotage is required from the pilotage limit to the designated anchor position". There was no liaising between Captain Hines and Captain Magazinovic, who is the current harbourmaster, in relation to the *Emerald Princess*, as required by SOP 36, and therefore Rule 90.23(6) does not assist Captain Hines.

[88] It follows that there was also no agreement between Captain Hines and Captain Magazinovic; rather Captain Hines relies on the previous harbourmaster's directions of March 2015 as constituting a general agreement between EPL and the harbourmaster, permitting the pilot to approve a vessel such as the *Emerald Princess* to depart her anchorage without a pilot on board. He points to the sentence "If a vessel is not carrying the appropriate Navigational Charts…then an Eastland Port Limited licensed Pilot must be engaged, even if the vessel is only proceeding to the anchorage." But these directions have to be read in conjunction with Maritime Rule Part 90 and can apply to vessels that are less than the specified limit for Eastland Port of 500 gross tonnes. I do not accept that the prohibition on vessels entering the port without navigational charts on board and without a pilot constituted a general agreement from the harbourmaster to an arrangement such as that which occurred with respect to the *Emerald Princess*. It is also not comparable to the minor incidents of non-pilotage near the boundary of pilotage waters to which the other witnesses referred.

[89] Mr Gaddum also considered that Captain Hines showed insufficient appreciation of the seriousness of his actions. That view is supported by the evidence. Captain Hines minimised the issue with respect to the *Seamount Explorer*, as he continues to do. He continued to maintain that his decision with respect to the *Emerald Princess* was correct, but advised that he would pilot out cruise ships in future "given that the company seemed to want that". This was a rather grudging concession, which reasonably did not inspire confidence that Captain Hines would act with more care in other situations that might arise.

[90] The decisions not to pilot either the *Seamount Explorer* or the *Emerald Princess* are circumstances that could justify EPL considering that Captain Hines' conduct deeply impaired or was destructive of the basic confidence and trust in him in his specialist and expert role. It was open to EPL to find serious misconduct.

[91] There were two additional matters that concerned Mr Gaddum. The first of these was Captain Hines' explanations about his movements while the *Seamount Explorer* came into berth, and the second was with respect to Mr Gaddum's request for the SMS audit report.

[92] Captain Hines accepts that an employer may expand a disciplinary process to include alleged untruthfulness in the employee's explanations, provided the process is fair and the employee is given a reasonable opportunity to respond to the new allegations.[14]

[93] Both these matters were raised with Captain Hines at the meeting of 17 May 2017, and in the letter dated 18 May 2017. He responded to them initially at the meeting of 17 May and then at length at the meeting of 26 May 2017.

[94] While Captain Hines argues that the explanation of being on the road above the Port was simply a refinement of the earlier description of being on wharf 6, I do not accept that. His explanations regarding his visit to the fuel stop also moved. His narrative of that morning overall lacked credibility and was unsupported by the evidence available to EPL. I consider it was reasonable for EPL to have disbelieved Captain Hines' account of his actions and to have seen him as changing his explanation as further evidence came to light.

[95] I also accept that Captain Hines was evasive about the SMS audit report. Captain Hines' claim that he understood that Mr Gaddum was asking for a copy of the final report and not the confidential draft report is not credible. The reference in the draft to financial issues influencing the decision not to pilot the *Seamount Explorer* reinforced Mr Gaddum's view that Captain Hines deliberately withheld it. That was a view open to him.

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[14] *George v Auckland Council* [2013] NZEmpC 179, [2013] ERNZ 675 at [101].

Issue 2: Was the investigation and disciplinary process fair and reasonable in the circumstances?

[96] Section 103A(3) of the Act requires the Court to consider:

(a) whether the employer sufficiently investigated the allegations against the employee;

(b) whether the matters of concern were raised with the employee;

(c) whether the employee had a reasonable opportunity to respond to those concerns; and

(d) whether the employer genuinely considered the employee's explanation before dismissing or taking action against the employee.

[97] Captain Hines also argues that EPL did not comply with its statutory good faith obligations in s 4(1A)(c) of the Act, which requires an employer to provide relevant information to an employee whose employment would be adversely affected by a proposed decision, and to give the employee the opportunity to comment.

Investigation sufficient

[98] Mr Gaddum admits that, at the time he embarked on this process, he was livid. He had learnt that a pilot had not been on board two vessels when he expected him to be there, piloting, in accordance with his employment agreement. Nevertheless, he did not react precipitously but set up an investigation and sought Captain Hines' explanation.

[99] Captain Hines complains that the scope of Mr Gordon's investigation was unclear and that there were no terms of reference. I do not accept that criticism. Everybody, including Captain Hines, knew that Mr Gordon was investigating the circumstances surrounding the non-pilotage of the *Seamount Explorer* when it came into Eastland Port, and the departure of the *Emerald Princess*, also without a pilot.

[100] Mr Gordon is not a maritime expert and does not profess to be. However, this was an employment investigation directed to finding the circumstances around those two events. An employer is entitled to use internal resources to conduct an investigation such as this. Mr Gordon obtained statements from the EPL people involved, including Captain Hines, and checked the record of interview with him. The email he received from the *Emerald Princess* advised that the captain of the *Emerald Princess* on the relevant day had asked Staff Captain Christopher Lye to respond, which he did, confirming the *Emerald Princess* left without a pilot on board after attempts to contact the pilot were unsuccessful. Mr Gordon went back specifically to ask if there had been a verbal agreement between the ship's captain and Captain Hines, to which Captain Lye replied that the ship's captain had "no recollection of any discussion regarding outward pilotage". Although I accept that, in fact, there was a conversation in which it was agreed that, if the captain was happy to depart without a pilot, he could do, there was no ambiguity in Captain Lye's responses to Mr Gordon warranting further investigation by Mr Gordon.

[101] The errors Captain Hines says are in the report are insignificant in terms of the substance of the report. They include such things as incorrect dates, incorrect reference numbers, and characterisations that go beyond what Captain Hines would use (eg he says an increase in the sea breeze is incorrectly described as the weather turning; and the email from Princess Cruises, referred in paragraph [35] above, was incorrectly described as a complaint). In relation to the interview questions, Captain Hines' movements at the time the *Seamount Explorer* was coming in was one matter at issue in the investigation, so it is understandable that Mr Gordon wanted to be clear about what Captain Hines was saying. The exchange may have been quite direct, and may have made Captain Hines uncomfortable, but it does not seem inappropriate. I also do not accept that Mr Gordon was precluded from being the investigator because he had some relevant information. That information, that Captain Hines turned from Crawford Road in front of Mr Gordon, was not contested. In any event, Mr Gordon was not the decision-maker, Mr Gaddum was, and so Captain Hines could address any different view to Mr Gaddum.

[102] Ultimately, I consider that the investigation was sufficient.

Captain Hines was aware of concerns and responded to them

[103] Captain Hines was provided with a copy of the investigation report to enable him to make comment, which he did extensively.

[104] I do not accept the outcome of the process was predetermined. Predetermination is more than having an initial view of the seriousness of the known or suspected conduct; it requires the decision-maker to have a closed mind.[15] The evidence was that, while he considered the allegations to be serious, and that the sanction could range from a warning up to dismissal, Mr Gaddum had not made any decision on outcome, pending consideration of Captain Hines' response.

[105] At the meeting of 17 May, Mr Gaddum also raised with Captain Hines his concern that Captain Hines had been deceitful in regard to the SMS audit report. Mr Gaddum's concern about his responses came out of the meeting of 17 May and were included in the letter dated 18 May, in which Mr Gaddum points out that Captain Hines' explanations were inconsistent with CCTV footage and that there was a significant time difference between when Captain Hines said he finished his observation of the vessel and when he alleged he visited the fuel stop. The fuel records and CCTV footage were given to him. These concerns are set out as "findings" and Captain Hines takes issue with that.

[106] Nevertheless, the meeting of 26 May, which ostensibly had been to discuss outcomes, went well beyond that. The factual findings remained in issue and were discussed at length. Captain Hines says he spoke extensively to his point-by-point response at the meeting. He also provided further documentation to EPL for its consideration.

Captain Hines' explanations were considered

[107] Captain Hines says that he expected EPL to conduct further inquiries as a result of the information he provided to it at the meeting of 26 May 2017. Mr Gaddum says

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15 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 179, 194; *Z v Attorney-General* 1 ERNZ 293 (EmpC) at [82]; *Secretary for Justice v Dodd* [2010] NZEmpC 84, (2010) 7 NZELR 578 at [94]; *Booth v Big Kahuna Holdings Ltd* [2014] NZEmpC 134, [2014] ERNZ 295 at [80].

that he considered all of the material he had but it seems he decided against further investigation.

[108] Because Captain Hines did not dispute the fundamental facts that were of concern to EPL, but rather introduced information to minimise or explain his conduct, it was reasonable of EPL not to go beyond the information it already had, which by then was quite extensive. This can be contrasted with cases such as *Hayashi v SkyCity Management Ltd*, where the statements of witnesses not contacted potentially could have affected the conclusions of the employer on the essential issues.[16]

[109] The letter of dismissal confirmed Mr Gaddum's previous factual findings and then said that Mr Gaddum was satisfied that it had been established that with his conduct Captain Hines had:

(a) failed to exercise the good judgement expected of a senior manager putting himself, others and the company in a position of unacceptable risk;

(b) acted in a manner that undermines or has the potential to undermine the company's reputation as an employer that is committed to providing and maintaining a safe and healthy work environment;

(c) acted in a manner that has negatively impacted on the employment relationship, and on the company's reputation externally with its clients, port users, maritime authorities and harbourmaster; and

(d) acted in a manner that has destroyed the essential trust and confidence in their employment relationship.

[110] Mr Gaddum said that he had considered the range of disciplinary sanctions available to him, including whether a final warning would be warranted. However, as he no longer had any trust and confidence that Captain Hines would have acted differently in the same circumstances, or that he would not act in a manner to protect

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16 *Hayashi v SkyCity Management Ltd* [2018] NZEmpC 14 at [33].

himself at the expense of the business, he had decided that the appropriate sanction was to terminate the employment relationship, effective immediately.

[111] The letter of dismissal was lengthy. It explained why Mr Gaddum had concluded that dismissal was the appropriate outcome. It also included the further photos. While those photos were not fundamental to the key issues, Captain Hines ought to have been invited to comment on them prior to the decision to dismiss him being reached.

[112] In summary then, I consider that the investigation was sufficient, Captain Hines understood the matters of concern and responded to them, and Mr Gaddum considered Captain Hines' responses before concluding that he was to be dismissed for serious misconduct.

Issue 3: Did any defects in the process result in Captain Hines being treated unfairly?

[113] It is well accepted that a disciplinary process is not to be put under a microscope and subjected to pedantic scrutiny, and that what is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.[17]

[114] Nevertheless, if the process is fundamentally flawed, the substantive conclusion cannot be taken to be reliable. So the test is whether the flaws were such that they undermined the reliability of the substantive conclusion reached by the employer.

[115] The statutory test for justification was repealed and substituted with the current s 103A on 1 April 2011, by s 15 of the Employment Relations Amendment Act 2010. Section 103A(3) sets out considerations that must be taken into account when considering process. Section 103A(4) expressly authorises the Court to take any other appropriate factors into account. Section 103A(5) precludes conclusions based on

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[17] *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35 (LC) at 46; *Howard v Carter Holt Harvey Packaging Ltd* [2014] NZEmpC 157 at [49].

minor or inconsequential defects in process, which do not result in the employee being treated unfairly.[18] When the amendment was introduced, the then Minister of Labour said that the proposed s 103A(5) was included to assure employers that minor procedural defects in their processes would not mean that a fundamentally justified decision can be deemed wrong.[19]

[116] In *Angus v Ports of Auckland Ltd* the full Court confirmed that the then new s103A did not alter the approach to what is sometimes referred to as procedural fairness, exemplified in a number of decisions of the Court, but continued the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification.[20]

[117] Captain Hines makes several complaints about how Mr Gaddum dealt with the disciplinary process, but none are enough to cast doubt on the fairness of the process and its outcome. They are minor and did not result in Captain Hines being treated unfairly.

[118] Captain Hines was aware throughout the disciplinary process that the principal concern of EPL was that he had failed to pilot the *Seamount Explorer* and the *Emerald Princess*, and he addressed those issues. The concerns Mr Gaddum had about Captain Hines' explanation of his movements on the morning of 30 March 2017, and regarding the SMS Audit Report, were raised once they were an issue. I acknowledge that these latter concerns were described as "findings" in the letter dated 18 May, after they had come up but before Captain Hines had been able to fully address them, but he had that opportunity at the meeting of 26 May 2017.

[119] Captain Hines takes issue with Mr Gaddum accepting the allegation that Captain Hines failed to act in the best interests of the Company by "Not complying with Maritime Rule Part 90…". Captain Hines argues that cannot be correct because the Maritime Rules Part 90 put obligations on the master of a vessel, rather than a

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18 *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431 at [39].
19 Employment Relations Amendment Bill (No 2) (16 August 2010) 665 NZPD 13305.
20 *Angus v Ports of Auckland Ltd*, above n 11, at [26].

pilot. However, that is a pedantic argument; while the allegation could have been better worded, in context, the allegation is directed at Captain Hines' actions, suggesting that they were inconsistent with the rule. I do not understand Captain Hines to be saying he had no obligation to act consistently with Part 90 and his representations to EPL were on that basis. The wording of the allegation was a minor issue and did not result in unfairness to Captain Hines.

[120] In his letter dated 18 May 2017, Mr Gaddum also found that Captain Hines failed to assist the *Seamount Explorer*, "…which resulted in the vessel colliding with the Moana Ice Tower, causing damage to the conveyer". This suggests a finding that there was a causative link between Captain Hines' failure and the collision, which was not open to EPL. The letter of dismissal was not so categorical. In it Mr Gaddum refers to the "heightened risk" that came with Mr Hines not being on board, with Mr Gaddum saying he did not accept Captain Hines' suggestion "that it would not have made a difference whether [Captain Hines was] on board the Seamount Explorer or not and that the vessel would have collided with the Ice Tower regardless, and that it is the sole fault of the vessel skipper and not anyone else's.". It does not reassert that Captain Hines' actions resulted in the damage. The finding, as articulated in the letter of dismissal, was open to EPL; put simply, it was open to EPL to find that Captain Hines' presence on board the *Seamount Explorer* may have made a difference.

[121] Another complaint of Captain Hines was that various notes created by EPL in the course of its process were not provided to him. While employees are entitled to receive information and evidence relevant to the employer's decision, it is not a requirement of either s 4(1A)(c) or s103A of the Act that an employee be provided with all the employer's own notes. The documentation Captain Hines received included the relevant information and was sufficient for him to understand and respond to EPL's concerns.

[122] I accept that the log book of the *Emerald Princess* was referred to by EPL but never provided to Captain Hines. It is not clear that EPL ever had the log book. When asked in cross examination about the alleged unsuccessful attempts at contact, Mr Gaddum referred to the email EPL had received from the *Emerald Princess* that said "Review of our Deck Log Book reveals that attempts to contact the Pilot were made

by both radio and telephone at 1700, 1715, 1730 and 1745. None of these attempts elicited any response." It was reasonable for EPL to rely on that advice from the *Emerald Princess*, and not to seek a copy of the log book entry. The references to the log book entries in correspondence with Captain Hines were consistent with the email. While EPL could have been clearer that this email was the source of its finding (if it was), or could have provided a copy of the log book entry (if it had it), Captain Hines had a copy of the email (attached to the investigation report) and was able to address the issue. He was not disadvantaged.

[123] While Captain Hines should have been given the opportunity to respond to the photos that he saw for the first time when he received the dismissal letter, they did not show anything different from what the other photos had shown (that his vehicle could not be seen on Kaiti Beach Road). Although Captain Hines gave evidence that he would have commented on the photos, he gave no evidence as to what he would have said, or why he felt the photos were significant to any of the central issues. They seem to raise no new issue.

Issue 4: Was EPL's decision to put Captain Hines under supervision an unjustifiable action causing disadvantage?

[124] The decision on 5 April 2017 to place Captain Hines under the supervision of Captain Kaye was made without consultation. It was not a demotion as contended by Captain Hines. Nevertheless, ideally there would have been at least a discussion prior to the decision being made.

[125] However, on Captain Hines' own evidence, the supervision did not impact on him operationally. It was known only to Mr Gaddum, Captain Hines and Captain Kaye. Captain Kaye was away for most of the period of the supervision and his supervision was limited to Captain Kaye keeping an eye on matters such as vessel size, state of tide, weather and SOP compliance. He did not stand over Captain Hines and watch his every move. Captain Kaye says it was akin to peer supervision, a check and balance, which he did remotely.

[126] Therefore, in this circumstance I consider the failure to discuss the proposed supervision to be a minor breach, which did not lead to unfairness. In any event there was no identified disadvantage to Captain Hines.

Issue 5: Was Captain Hines unjustifiably disadvantaged when EPL decided to relieve him from vessel piloting duties from 19 May 2017?

[127] The decision to relieve Captain Hines from vessel-piloting duties was not a suspension. His other duties remained. But, again, EPL ought to have discussed this with Captain Hines, even though it was proposed to be just for the weekend preceding the next meeting. Again, this was a minor defect and did not create unfairness in the circumstances. Nor did it disadvantage Captain Hines.

Issue 6: Was Captain Hines dismissed or otherwise subject to a detriment because he had submitted a personal grievance to EPL?

[128] The combined effect of ss 103(1)(c), 104(1) and 107(1)(e) of the Act allows employees to bring a personal grievance if they consider they have been the subject of a detriment as a consequence of their having submitted another personal grievance to their employer.

[129] Section 103(1)(c) allows employees to bring a personal grievance where they consider they have been discriminated against in their employment.

[130] Section 104(1) provides that discrimination includes where the employee is dismissed or disadvantaged because of his or her "involvement in the activities of a union".

[131] Section 107 defines "involvement in the activities of a union" and includes, at s 107(1)(e), where an employee has submitted another personal grievance to the employer. There is no need for there to be any union involvement for s107(1)(e) to apply.

[132] Where discrimination is alleged, s 119 provides that there is a rebuttable presumption that the employer discriminated against the employee. EPL did not appreciate the bases for the claim of discrimination, and therefore did not address the presumption head on.

[133] In his statement of claim, Captain Hines alleges that EPL's decision to relieve him from vessel piloting duties from 19 May 2017 was because he had raised a grievance regarding supervision on 7 April. He also claims he was dismissed because he had raised prior grievances with EPL, these being the grievance he says was raised on 7 April, and that raised by Captain Hines' representative, Mr McBride, in his letter of 24 May 2017, which was that Captain Hines had been unjustifiably disadvantaged in his employment by the manner and nature of the investigation undertaken and the findings already made by EPL.

[134] Mr Moroney did not consider that his discussion with Captain Hines on 7 April 2017 amounted to Captain Hines raising a grievance. For a grievance to be raised an employee must make (or take reasonable steps to make) the employer aware that the employee alleges a personal grievance that he or she wants the employer to address.[21] A personal grievance can be raised informally, and orally. The relief sought does not need to be particularised.[22] However, a simple complaint or enquiry is not enough, nor is it enough for employees to advise that they consider that they have a personal grievance. The employer must reasonably understand that an employee wants the employer to address his or her concerns.[23]

[135] Captain Hines' evidence was that he told Mr Moroney that he had a personal grievance about the events and his "demotion", and that the matter needed to be resolved. Mr Moroney's recollection was that Captain Hines said he thought he had a personal grievance, but that he did not raise a personal grievance. Mr Moroney's notes, made shortly after the meeting, refer to Captain Hines having an issue with being under supervision, mentioning it was "almost a personal grievance" and Mr

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21 Employment Relations Act 2000, s 114(2).

22 *Idea Services Ltd (in stat man) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [40].

23 *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [35]–[36]; note that this judgment was reversed on appeal, but not on this point; *Commissioner of Police v Creedy* [2007] NZCA 311, [2007] ERNZ 505; that decision affirmed at the Supreme Court; *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] ERNZ 109.

Moroney saying that if Captain Hines wanted to raise a personal grievance he could "go for it". Captain Hines did not follow up on this discussion, and made no mention of a personal grievance to either Mr Gordon or Mr Gaddum. On balance, I do not consider he raised a personal grievance on 7 April or at any time before 24 May 2017.

[136] Captain Hines points to the correspondence between Mr McBride and EPL as evidence of discrimination in relation to the dismissal. In Mr McBride's letter of 24 May 2017 he referred to EPL's "woefully inadequate investigation", its "grossly inappropriate conduct", and "its ham-fisted approach". He alleges that the decision was pre-determined. Mr McBride also said that he would take "all necessary steps to defend our client". When Mr Gaddum responded to that letter, he noted this last point and said it sounded particularly ominous and threatening and that, if Mr McBride was threatening him in an attempt to impact unduly on his decision-making, he would take a dim view of such conduct. Mr Gaddum went on that how Mr McBride and Captain Hines chose to respond at the upcoming meeting would influence his decision-making, and that the meeting was Captain Hines' opportunity to discuss the findings and provide any further response or information.

[137] While Mr Gaddum may have been wiser not to have reacted to the tone of the letter from Mr McBride, his comments did not amount to him saying Captain Hines would be disadvantaged for raising a grievance. Rather, he alerted Captain Hines that his attitude to the matters of concern would be a factor in his consideration of outcomes, which is fair.

[138] Further, I am satisfied that the evidence conclusively establishes that the dismissal of Captain Hines was not because he had previously raised grievances about his treatment in the investigation process, but was for the reasons outlined in the letters dated 18 May and 31 May 2017. The evidence is overwhelming that Captain Hines' dismissal resulted from the non-pilotage incidents, and not because he previously had raised a grievance.

[139] Captain Hines' discrimination claim fails.

Issue 7: To what extent is Captain Hines entitled to indemnity costs pursuant to the indemnification clauses of his employment agreement?

[140] Captain Hines claims that, pursuant to the provisions of his employment agreement, he is entitled to the costs he has incurred in obtaining representation and advice for the investigation and disciplinary process. He also foreshadowed that he would seek indemnity costs for his claim in the Authority and Court.

[141] It is not uncommon for employers to indemnify their employees against third party claims arising out of the employees' employment. It also is well established that a party to a contract (including an employment agreement) may contractually bind itself to pay costs on a solicitor-client basis to the other party, should litigation ensue. If the indemnity is applicable, no discretion remains available, except on public policy grounds or as part of an assessment as to whether the amount of the solicitor-client costs is reasonable.[24]

[142] Clause 21(a) of Captain Hines' employment agreement entitles him to indemnification by EPL against all monetary claims, damages and expenses (including expenses incurred in defence against any legal action) brought or awarded against or incurred by him arising from any act or omission or negligent act or omission of his whilst acting in the scope of his employment or authority.

[143] Clause 21(d) specifically provides that EPL shall be released from its obligations under the clause if such claims, damages or expenses arise in relation to a claim against EPL in relation to the employee's employment.

[144] The schedule to the employment agreement then provides that EPL will pay all reasonable expenses incurred, including where Captain Hines uses an independent representative of his choice, if his conduct is the subject of proceedings, or an inquiry before any court, judicial or quasi-judicial authority, and tribunal or government agency for any alleged breach of any laws, maritime port laws or regulations that apply in connection with his employment as a pilot.

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[24] *ALA v ITE* [2016] NZEmpC 42, (2016) 15 NZELR 16 at [86], citing *Watson & Son Ltd v Active Manuka Honey Assoc* [2009] NZCA 595 at [21].

[145] Captain Hines argues that cl 21(a) requires EPL to pay the expenses he incurred during the investigation and disciplinary process.

[146] He also argues that the schedule creates an additional indemnity, separate from that in cl 21, which would apply where, as here, Captain Hines brings a claim against EPL in relation to his employment.

[147] I do not agree with either argument. In context, I do not accept that expenses incurred can be separated from the remainder of cl 21(a), which envisages a claim or other legal action being brought against Captain Hines.

[148] I also do not accept that the schedule is to be read independently from cl 21. To read it as Captain Hines does would negate cl 21(d). In my view, it supplements cl 21, confirming that the indemnity covers where an employee uses an independent representative of his or her choice and/or where the employee is alleged to have broken the law and is facing criminal or quasi-criminal action.

[149] No claim or other legal action has been brought against Captain Hines, and he is not facing an award of damages. The investigation and disciplinary process was not a proceeding, nor was it an inquiry before any court, judicial or quasi-judicial authority, tribunal or government agency.

[150] Further, in relation to the Authority and Court proceedings, the exception in cl 21(d) would be applicable.

[151] Captain Hines cannot call on the indemnity clause in his employment agreement.

[152] Although I consider that this conclusion is apparent from reading the terms of the employment agreement, I note it is also consistent with the understanding Captain Bolt has of the intention of such clauses, which are common in the maritime environment, and which are to indemnify a pilot against any civil claim that might be brought against the pilot, and also to cover a pilot's legal costs if the pilot were to be prosecuted, for example by Maritime New Zealand.

Issue 8: What, if any, remedies are or would have been awarded?

[153] As Captain Hines has been unsuccessful, remedies do not need to be resolved. Nevertheless, this would not have been a case where I would have ordered reinstatement. That is for a number or reasons, principally in relation to Captain Hines' conduct.

[154] His failure to pilot the two vessels was unexplained and in breach of his employment obligations. He was in a position of high trust. He had particular expertise and, as was acknowledged by Captain Hines, EPL was entitled to trust his judgement and actions.[25]

[155] Although, on a number of occasions, he said that he was sorry in relation to the *Seamount Explorer* and he also said that he would in future pilot vessels in accordance with the expectations of the EPL, Captain Hines' conduct and reactions were not such as to inspire confidence in his judgement. He did not present as contrite, but minimised both incidents. In addition, his changing explanations in relation to his movements while the *Seamount Explorer* came in to port, and his evasiveness regarding the SMS audit report, would have caused me concern in ordering reinstatement.

[156] I also note that, as a result of his conduct, his colleagues have been placed in difficult positions. The impact on them of reinstatement is something the Court must consider.[26] Captain Kaye was placed in the unenviable position of attempting to support a colleague in relation to actions that he did not agree with. He gave evidence of the significant impact on him of Captain Hines' actions and subsequent dismissal, and of his difficulties in working with Captain Hines again. Other colleagues also gave evidence of their concerns about working with Captain Hines in the future. I do not think it is reasonable or practicable to require EPL to re-employ Captain Hines to work in a team with those colleagues and alongside Captain Kaye. This is so especially as ports are safety-sensitive worksites where team dysfunction would be particularly problematic.

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25 See [80] above.

26 *Angus v Ports of Auckland Ltd,* above n11, at [68].

[157] Then there is the matter of the new pilot. Captain Kaye gave evidence of the need for a pilot to be engaged relatively quickly, and that engagement on a fixed-term or contract basis was not practicable. Accordingly, a permanent pilot has been engaged and has moved to Gisborne from the South Island.

[158] While the Court is wary of refusing reinstatement where an employer claims there is no position available, particularly where the employer, as here, was aware that reinstatement was being sought, it does not follow that it is never relevant. Practicality is not to be narrowly construed in the sense of being simply possible, irrespective of consequence.[27] The availability of an appropriate position is one matter the Court will take into account when assessing whether reinstatement is reasonable and practicable.[28]

[159] Here, if Captain Hines had been reinstated, EPL would have been in a position of employing three pilots where only two were required. It could not simply unravel the appointment of the new pilot.[29] Inevitably, if Captain Hines was reinstated, EPL would need to consider how to deal with this issue, affecting all three pilots, reinforcing that such an order would be neither practical nor reasonable.

[160] Captain Hines would have been entitled to his loss of earnings up until the date of hearing, which would have included the company benefits to which he was entitled under his terms and conditions, but also would have taken into account payments received on termination.

[161] Captain Hines also would have been entitled to compensation under s 123(1)(c)(i). Both Captain and Mrs Hines gave evidence of the distress caused to Captain Hines by his dismissal. Captain Hines did not place a figure on this part of his claim, but if a band approach was used, this case would merit an amount towards the top of band 2.

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27 *Lewis v Howick College Board of Trustee*s [2010] NZEmpC 4, [2010] ERNZ 1 at [113], quoting *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416.

28 *Canterbury Hotel, Hospital etc IUOW v F (t/a G Rest Home)* [1988] NZILR 1604 (LC) at 1621; *Fifield v Rotorua District Council* [1989] 3 NZILR 495 (LC); *Clarke v Norske Skog Tasman Ltd* [2003] 2 ERNZ 213 (EmpC) at [66], [79]: not disturbed on appeal; *Norske Skog Tasman Ltd v Clarke* [2004] 3 NZLR 323, [2004] 1 ERNZ 127 (CA) at [87]–[89].

29 *Asken v NZ Rail Ltd* WEC33/94, 12 July 1994 at 19.

[162] Captain Hines also claimed for the loss he says was incurred when he sold an investment property for $140,000 below the land agent's estimated sale value. I do not accept that the evidence was sufficient to find that loss to be established, or attributable to Captain Hines' dismissal.

[163] Finally, I would have been required by s 124 of the Act to consider the actions of Captain Hines which contributed towards the situation that gave rise to the personal grievance. In that regard, I would have found that his admitted failure to pilot the two vessels, and his conduct through the disciplinary process, contributed towards the decision to dismiss him. This would have led to a reduction in the compensation that otherwise would have been awarded to him.

Costs

[164] EPL has been the successful party here and is entitled to costs. This case was assigned category 2B for costs purposes. If costs are sought by EPL and cannot be agreed between the parties, EPL may file an application for costs within 28 days of this judgment. Captain Hines then has a further 14 days within which to respond.

J C Holden
Judge

Judgment signed at 11.45 am on 16 July 2018