IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA455/2018
[2018] NZCA 564

BETWEEN	PAUL HINES Applicant
AND	EASTLAND PORT LIMITED Respondent

Court:	Brown and Clifford JJ
Counsel:	P A McBride for Applicant E J Brown for Respondent
Judgment: (On the papers)	6 December 2018 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] Paul Hines, the applicant, was dismissed by his employer, the respondent Eastland Port Ltd, in May 2017. In July this year the Employment Court dismissed

Captain Hines de novo challenge to determinations of the Employment Relations Authority upholding the lawfulness of the actions of Eastland Port.[1]

[2] Captain Hines now applies pursuant to s 214 of the Employment Relations Act 2000 for leave to appeal that decision of the Employment Court as being wrong in law.

[3] We may only grant leave if in our opinion the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to us for decision.

Background

[4] In 2017 Captain Hines was employed by Eastland Port as a pilot for its port at Gisborne. In that role, Captain Hines was the duty pilot on 26 February and 30 March.

[5] On 26 February Captain Hines was not on board a cruise ship, the *Emerald Princess*, when it left Gisborne port. On the morning of 30 March Captain Hines was not on board a fishing trawler, the *Seamount Explorer*, when it came into port and, in doing so, collided with an ice tower on a wharf at the port.

[6] The Maritime Transport Act 1994 requires the master of a ship to ensure that a pilot is taken on board in accordance with and whenever required by maritime rules.[2] As relevant, those rules require a master to do so when her ship is navigating in that pilotage area and her ship meets or exceeds any limits specified for that area.[3] She is not required to do so when she receives advice from a pilot that the pilot is unable to transfer to or from the ship safely and, in the opinion of the pilot, the movement of the ship within the pilotage area can be completed safely with the pilot's advice. That requirement does not apply where the ship is transiting between the perimeter of the pilotage area and a designated pilot boarding station or anchorage within that area, with the prior approval of a pilot.

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1 *Hines v Eastland Port Ltd* [2018] NZEmpC 79 [Employment Court decision].
2 Maritime Transport Act 1994, s 60A(1).
3 Maritime Transport Rules, pt 90.

[7] Both the *Emerald Princess* and the *Seamount Explorer* exceeded Eastland Port's 500 gross tonne trigger for a pilot. Eastland Port's general manager, Mr Gaddum, became aware of the arrival of the *Seamount Explorer* without a pilot on board. After an initial conversation with Captain Hines about the possibility of a breach of rules, Mr Gaddum asked the Port's Health, Safety and Environmental Facilitator (Mr Gordon) to look into the matter with support of the other pilot and another Port executive. Shortly thereafter Mr Gaddum became aware of the *Emerald Princess* having departed without a pilot. That prompted Mr Gaddum to formalise and extend the investigation already underway. Captain Hines was put under the supervision of his fellow pilot.

[8] By early May, Mr Gordon had completed his report. Mr Gaddum provided the report to Captain Hines under cover of a letter which alleged that the two incidents constituted serious failures by Captain Hines of his obligations as an employee of Eastland Port. The letter also advised that if the allegations were established it could lead to the termination of Captain Hines' employment for serious misconduct. Following a relatively informal meeting on 17 May (no formal record was kept) Mr Gaddum wrote on 19 May advising Captain Hines that he had concluded his behaviour amounted to serious misconduct. A further meeting would be held at which Captain Hines could make further representations before Mr Gaddum made a decision. That meeting took place on 26 May. As described by the Employment Court in its judgment, it "principally involved Captain Hines speaking and others listening".[4] Following that meeting, Mr Gaddum concluded that Captain Hines' behaviour amounted to serious misconduct. Captain Hines' employment was terminated at that point. In reaching that conclusion, Mr Gaddum recorded that not only did the two incidents constitute a breach of Captain Hines' obligations as an employee, but that he was satisfied that Captain Hines had also been dishonest in the way he had explained circumstances relating to the berthing of the *Seamount Explorer*.

Serious Misconduct

[9] Before the Employment Court Captain Hines said it was not open to Eastland Port to find that his behaviour constituted serious misconduct. He had an

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4 Employment Court decision, above n 1, at [69].

honest belief that he was acting lawfully when he did not pilot the two vessels. In the case of the *Seamount Explorer* he had a genuine but mistaken view of the rules, and the breach was minor. As regards the *Emerald Princess*, his decision was in accordance with the rules. A finding of dishonesty in the course of the investigation had no proper basis.

The Employment Court decision

[10] The Employment Court found that:[5]

(a) It was open for Eastland Port to find that Captain Hines' conduct was serious misconduct.

(b) The investigation was sufficient despite some defects in the process. These defects did not create unfairness.

(c) Eastland Port should have consulted Captain Hines before placing him under supervision of another captain and before relieving him from piloting duties, but these defects were minor and did not create unfairness or disadvantage.

(d) Captain Hines was not entitled to indemnity costs under an indemnification clause in his employment agreement.

Grounds for appeal

[11] Captain Hines applies for leave on the basis that the Employment Court made errors of law by reaching findings that were not open on the evidence and by misdirecting itself as to the legal principles that apply to employment relations disciplinary processes. The Employment Court also erred in the way it interpreted provisions of Captain Hines's employment contract relating to indemnity costs.

[12] Those errors are of general and public importance because they are of potentially wide significance to employers and employees generally, the matter is of

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5 At [5].

particular importance to Captain Hines and because the approach taken by the Court in Captain Hines' case diverges from the approach previously taken.

[13] Eastland Port responds that the matters identified are not errors of laws, but findings of fact that were open to the Employment Court. Moreover, there is no matter of general or public importance, or which otherwise justifies a grant of leave. This was a procedurally sound and substantively correct decision by Eastland Port. After a procedurally fair process Eastland Port had found that Captain Hines had failed to be on the two vessels as required by maritime rules and hence his contract of employment. That was manifestly serious misconduct which justified dismissal. The Employment Relations Authority and the Employment Court were right to dismiss Captain Hines' challenges.

Analysis

[14] In his submissions, Captain Hines says there are four questions of law which justify the grant of leave:

(a) Did the Employment Court err in law in finding his dismissal to have been justified?

(b) Did the Employment Court err in law in its findings that s 4(1A)(c) of the Employment Relations Act did not require full disclosure of all relevant information held by Eastland Port and an opportunity to comment on that before dismissal?

(c) Did the Employment Court err in law in finding that no personal grievance arose from a change to and removal from professional duties without prior consultation?

(d) Did the Employment Court err in law in its determination of the inapplicability of cl 14 of sch 1 of the employment agreement?

[15] We focus our analysis on whether the proposed questions are questions of law of general or public importance.

Did the Employment Court err in law in finding the applicant's dismissal to have been justified?

[16] In support of the first proposed question, Captain Hines says the Court erred in making findings contrary to the only available evidence. Here he is concerned with the Employment Court's reliance on what Mr Gaddum considered to be dishonesty in the way Captain Hines had responded to the investigation into his conduct.

[17] He focuses on whether the allegations of dishonesty and Mr Gaddum's request for the SMS audit report were raised at the 17 May meeting. The Employment Court found they were.[6] However, Captain Hines' evidence-in-chief explicitly disavowed this, and Mr Gaddum in cross-examination accepted that he could not recall whether the allegations were discussed at the 17 May meeting.

[18] With that in mind, we accept that the Judge's finding about the contents of the 17 May meeting may not be sustainable. However, there is no challenge to the Judge's finding that Captain Hines was able to, and did, respond to those matters "at length at the meeting of 26 May".[7] As the Judge noted, at that stage the "factual findings remained in issue and were discussed at length", with Captain Hines responding "extensively".[8] In other words, Captain Hines was given a reasonable opportunity to respond to the allegations — as is required when a disciplinary process is expanded to include alleged untruthfulness in the employee's explanations throughout that process.[9]

[19] Captain Hines also contends that the Employment Court departed from the evidence when — in not upholding the concern he had as regards the way Mr Gaddum had approached issues of dishonesty — it found that "although [the] 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 vessels]".[10] In other words, Captain Hines says that the Employment Court underestimated the part that

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6 At [93].
7 At [93].
8 At [106].
9 *George v Auckland Council* [2013] NZEmpC 179, [2013] ERNZ 675 at [101].
10 Employment Court decision, above n 1, at [58].

Mr Gaddum's assessment of his dishonesty had played in the investigation and final employment decision.

[20] In support of this point, Captain Hines refers to Mr Gaddum's cross-examination. It was put to Mr Gaddum that throughout the process the focus was on Captain Hines' conduct as a pilot. Mr Gaddum responded by stating that "it started as that and then [got] more into issues of honesty and trust by the end of it, which is indicated in the way through". Captain Hines says that confirms his view of things, and highlights that the Employment Court had departed from the evidence in the way he had submitted.

[21] We do not agree. The basic reason Eastland Port dismissed Captain Hines was that it found he had not been on two vessels when the terms and conditions of his employment required him to be. It was during the course of its investigation into those occurrences that Captain Hines' incorrect and inconsistent explanation relating to those two events became an additional matter of concern for his employer. We think that is what Mr Gaddum was explaining at that point of his evidence. That is confirmed where, at another stage in his evidence, Mr Gaddum said "for me as the decision maker at the core of everything … the fundamental fact is [Captain Hines] was not on board the *Seamount Explorer* or the *Emerald Princess* piloting those two vessels as he is employed to do".

[22] With that in mind, we are satisfied that the Employment Court did not err in law in finding Captain Hines' dismissal to have been justified. In reaching that conclusion, we emphasise that the Employment Court had explicit regard to the criteria in s 103A of the Employment Relations Act when considering whether Captain Hines' dismissal was justified. As relevant, the Employment Court also considered the leading case of *Angus v Ports of Auckland Ltd* when determining that any defects in the process were not fatal to the decision to dismiss Captain Hines.[11] We are accordingly satisfied that there is nothing in Captain Hines' first proposed question of law.

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[11] *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466.

Did the Employment Court err in law in its findings that s 4(1A)(c) of the Employment Relations Act did not require full disclosure of all relevant information held by the Eastland Port and an opportunity to comment on that before dismissal?

[23] Captain Hines second proposed question focuses on the scope of the obligation in s 4(1A)(c) of the Employment Relations Act. Section 4 deals with the requirement that parties to an employment relationship must deal with each other in good faith. As part of that requirement, s 4(1A)(c) provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of employment of the employee must provide the employee with "access to information, relevant to the continuation of the employees' employment, about the decision".

[24] On appeal, Captain Hines proposes to argue that the Employment Court "substantially narrowed the scope of that obligation, in stark contrast to existing Employment Court jurisprudence, in finding that there was no requirement to provide certain relevant information".

[25] We are satisfied that there is no merit in this proposed question of law. The Employment Court did not find that "there was no requirement to provide certain relevant information". To the contrary, it simply found that Eastland Port had provided all relevant information:

> [121] Another complaint of Captain Hines was that various notes created by [Eastland Port] 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 s 103A 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 respond to [Eastland Port's] concerns.

[26] Captain Hines' submission ultimately boils down to a contention that he did not receive all relevant information. In the context of this case, this does not amount to a question of law, but rather a challenge to the Judge's factual findings of relevance. That is not amenable to a grant of leave pursuant to s 214 of the Employment Relations Act.

Did the Employment Court err in law in finding that no personal grievance arose from a change to and removal from professional duties without prior consultation?

[27] The third proposed question of law relates to the decisions in April and May to place Captain Hines under supervision and later remove his vessel piloting duties. In the Employment Court, Captain Hines said this amounted to a personal grievance, being an unjustified action by Eastland Port to Captain Hines' disadvantage. This failed in the Employment Court, on the basis that there were no identified disadvantages to Captain Hines.[12] In so finding, the Employment Court acknowledged that ideally there would have been at least a discussion prior to the decisions being made.

[28] On the proposed appeal, Captain Hines seeks to argue that the Employment Court erred in law in finding that no personal grievance arose from a change to and removal from professional duties without prior consultation. He points to *Sefo v Sealord Shellfish Ltd*, where the Employment Court stated "it is well established that a suspension of an employee from employment is a disadvantageous action so far as the employee is concerned".[13] As is reasonably evident, however, that case concerned suspension. That is not the case here.

[29] In a personal grievance claim for unjustifiable action, the onus is initially on the employee to establish the employment conditions have been affected to their disadvantage. The concept of disadvantage caused by unjustified action on an employer's part is a wide concept and can include many forms of disadvantage.[14] However, the onus is still ordinarily on the employee to establish that they have been disadvantaged. On that basis, we see no error in the Employment Court considering whether Captain Hines' evidence established that he had been disadvantaged. The conclusion that he had not been — based on Captain Hines' own evidence that supervision did not impact on him operationally — was one that was open to the Court.

[30] We are satisfied that there is nothing in Captain Hines' third proposed question of law.

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12 Employment Court decision, above n 1, at [125].
13 *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178, (2008) 5 NZELR 407 at [40].
14 *Alliance Freezing Co (Southland) Ltd v New Zealand Engineering Workers Union* [1990] 1 NZLR 533 (CA).

Did the Employment Court err in law in its determination of the inapplicability of cl 14 of sch 1 of the employment agreement?

[31] The final proposed question of law relates to the interpretation of an indemnification clause in the employment agreement. In essence, Captain Hines claims that, under the employment agreement, Eastland Port agreed to pay his costs if he brought a personal grievance claim.

[32] As the Supreme Court noted in *New Zealand Air Line Pilots' Association v Air New Zealand*, a question of interpretation arising out of an employment agreement may give rise to a question of law that is appealable under s 214 of the Employment Relations Act. However, the error must extend beyond construction of an individual agreement to the principles and the approach in general that is taken.[15]

[33] Captain Hines says the approach the Court took to interpretation was irregular and unorthodox, but has failed to explain *why* the approach was irregular and unorthodox.

[34] In our view, the Employment Court adopted an orthodox approach when interpreting the clause in question. This included consideration of the terms of the clause in question, the purpose behind the clause, and the place of the clause in the agreement as a whole. Of particular importance was the fact that, if Captain Hines' interpretation was to be adopted, then another clause in the contract would be of no effect. We see no reason to differ from the Employment Court's interpretation of the clause in question.

[35] For those reasons, we decline to grant leave on the fourth proposed question of law.

Result

[36] The application for leave to appeal is declined.

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[15] *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [62].

[37] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
McBride Davenport James, Wellington for Applicant
Brown & Bates, Napier for Respondent