

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 45
3012991

BETWEEN PAUL HINES
 Applicant

A N D EASTLAND PORT LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: P McBride, Counsel for the Applicant
 L Brown, Counsel for the Respondent

Investigation Meeting: 5 to 6 July, 29 to 30 August and 3 to 4 October 2017 in
 Gisborne

Submissions received: 4 October 2017 from both parties

Date of Determination: 12 February 2018

DETERMINATION OF THE AUTHORITY

A. This application for personal grievance is dismissed. Costs reserved.

Employment Relationship Problem

[1] This matter deals with the remainder of issues from an earlier determination dated 9 January 2018 (dismissal determination).¹ In the earlier determination I found Captain Hine's dismissal was justified. I reserved the remaining disadvantage personal grievances for determination at a later date.

[2] The relevant facts were set out in the dismissal determination. I do not intend repeating those here.

Issues

[3] The remaining issues for determination of the disadvantage grievances are:

¹ *Paul Hines v Eastland Port Limited* [2018] NZERA Auckland 7.

- (a) Whether Captain Hines was unjustifiably disadvantaged by the following actions:
- (i) Suspension;
 - (ii) Demotion; and
 - (iii) Discrimination by the respondent's response to the personal grievance having been taken and his dismissal occurring within a 12 month period; and
- (b) What remedies, if any, should arise?

Was Captain Hines unjustifiably disadvantaged by demotion?

[4] From the evidence the demotion occurred because Captain Hines was required to undertake his job supervised by a colleague Captain Christopher Kaye. This occurred from 5 April until 18 May 2017 during the investigation into the serious misconduct. It is accepted this action occurred.

[5] The nature and extent of the allegations made it more likely than not supervision would have been required while the matter was investigated. EPL had no other way of monitoring his compliance with pilot duties without supervision. It could have exercised its contractual rights to suspend him on full pay under clause 22(e) of his employment agreement, but chose not to.

[6] The supervision from Captain Hine's evidence had little if any impact at all upon his working life. Captain Kaye was largely out of the workplace. Captain Hines described calling him a couple of times at most. No complaint was raised about the supervision until the statement of problem was filed following dismissal.

[7] Although this action occurred without prior consultation, the defect was minor and did not create unfairness in these circumstances. Captain Hine's was not unjustifiably disadvantaged by these actions.

Was Captain Hines disadvantaged by his suspension?

[8] It is accepted Captain Hines was suspended from duties from 18 to 31 May 2018 on full pay.

[9] Clause 22(e) of the employment agreement gave EPL the contractual right to suspend Captain Hines on full pay pending the outcome of an investigation into potential dishonesty and/or serious misconduct for period the employer reasonably thinks.

[10] The suspension occurred following an investigation and preliminary findings of dishonesty and serious misconduct. Captain Hines continued to receive his pay during suspension. From the evidence he needed this time to undertake his own extensive investigations. He presented these to Mr Gaddum at the final meeting. In my view he could not have been able to adequately undertake these investigations and properly instruct out of town Counsel, if he had been required to work.

[11] Although this action occurred without prior consultation, the defect was minor and did not create unfairness in these circumstances. Captain Hine's was not unjustifiably disadvantaged by these actions.

Was Captain Hines disadvantaged by discrimination by the respondent's response to the personal grievance having been taken and his dismissal occurring within a 12 month period?

[12] Section 103(1)(c) includes discrimination in employment as a type of personal grievance. Section 104 of the Act provides that "an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly ... involvement in the activities of a union in terms of section 107..." It also prohibits an employer dismissing an employee or subjecting them to any detriment as a consequence of their involvement in Union activities.

[13] Section 107 prescribes what amounts to discrimination on the basis of involvement in Union activities:

- 107 Definition of involvement in activities of union for purposes of section 104
- (1) For the purposes of section 104, involvement in the activities of a union means that, within 12 months before the action complained of, the employee—
- (a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union; or
 - (b) had acted as a negotiator or representative of employees in collective bargaining; or
 - [(ba) had participated in a strike lawfully; or]
 - (c) was involved in the formation or the proposed formation of a union; or
 - (d) had made or caused to be made a claim for some benefit of an employment agreement either for that employee or any other employee, or had supported any such claim, whether by giving evidence or otherwise; or

- (e) had submitted another personal grievance to that employee's employer; or
- (f) had been allocated, had applied to take, or had taken any employment relations education leave under this Act; or
- (g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees.

[14] The statutory scheme infers there is a casual connection between the applicant's Union activity and the disadvantaging or dismissal action taken by the employer. It was unclear to me from his evidence when or how Captain Hines became a Union member or what were his Union activities giving rise to discrimination.

[15] No Union was involved in Captain Hines disciplinary process or in the raising of a personal grievance. There is little detail of any casual connection with Union activity. The letter dated 24 May 2017 raises a personal grievance pertaining to the investigation of the serious misconduct. It does not refer to any action giving rise to discrimination on the basis of Union activities.

[16] A personal grievance of unjustified dismissal was raised on 1 June 2017. This also does not refer to the dismissal giving rise to discrimination on the basis of Union activities.

[17] It is not until the statement of problem was filed on 13 June 2017 that for the first time a disadvantage due to discrimination on the basis of Union activities is raised. It is inferred Captain Hines must have joined the Union or belatedly told his lawyer about this fact after 1 June 2017.

[18] The failure to previously mention his Union activity suggests the events are unrelated. While there was mention of the terse exchange between Mr Gaddum and Mr McBride giving rise to this claim, I cannot see how that was casually related to Union activities at all.

[19] This application for personal grievance is dismissed. Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority