

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2023] NZERA 346
3161426

BETWEEN HUGH O'NEILL
Applicant

AND PORT OTAGO LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Paul McBride, counsel for the Applicant
John Farrow and Kelly Thomson, counsel for the
Respondent

Investigation Meeting: 27, 28 February, 1,2,3 March 2023 in Dunedin and 17
March 2023 in Queenstown

Submissions Received: 21 March and 4 April 2023 from Applicant
21 March and 31 March 2023 from Respondent

Date of Determination: 30 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Captain Hugh O'Neill was employed by Port Otago Limited (Port Otago) as a Senior Maritime Pilot based in Dunedin and working in the Otago port environs. Captain O'Neill was summarily dismissed, effective from 8 September 2021. The position occupied was the subject of a collective employment agreement between

Port Otago and the New Zealand Maritime Service Guild IUOW Inc (the Union). Captain O'Neill was a union member and activist on health and safety issues through the union and co-membership of the New Zealand Maritime Pilots Association (a professional body).

[2] Captain O'Neill alleges an unjustified dismissal and an unjustified disadvantage, claiming his employer had no substantive reasons to summarily dismiss him and that this was preceded by an unjustified suspension and investigation conducted in a procedurally unfair and biased manner. Captain O'Neill also asserted that Port Otago acted in a discriminatory manner in effecting his dismissal.

[3] Captain O'Neill is seeking reinstatement and compensatory remedies.

[4] Port Otago by contrast, contend: that the dismissal was effected in a procedurally fair manner in accord with good faith obligations; the suspension was necessary in the circumstances and the disciplinary investigation established grounds to warrant summary dismissal that included a finding that Captain O'Neill misled the investigator and decision-maker. Port Otago deny any form of discrimination was present in their decision-making.

[5] The parties subsequently attended mediation but the matter remained unresolved.

The Authority's investigation

[6] The investigation meeting took six days and a half day for submissions. I received extensive written and oral evidence from Captain O'Neill, his former co-pilot colleagues: Joshua Osborne (current pilot) and Lex Lane (retired pilot). The Port Otago witnesses were Sean Bolt (ex-General Manager Marine), Kevin Winders (current Chief Executive), Gavin Schiller (ex-Health and Safety Manager) Sumanth Surendran (current pilot), Lawrence Clark (current pilot), Francis O'Neill (Pilot Launch Captain), Craig Holmes (casual Pilot), Geoffrey Plunket (ex-Port Otago Chief Executive) and Kate Walton (ex-Head of People: Human Resources).

[7] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the

helpful submissions and information received from both parties and refer to them where appropriate and relevant. The person involved in the complaint that led to Captain O’Neill’s dismissal did not give evidence or appear at the investigation meeting. I refer to him throughout as the “Casual Pilot”.

Issues

[8] The broad issues to be decided are:

- (a) Was Captain O’Neill unjustifiably dismissed?
- (b) If the Port Otago’s actions, in dismissing Captain O’Neill (including the suspension) do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering his claims for:
 - (i) Reinstatement.
 - (j) Lost wages under s 123(1)(b) of the Act plus interest.
 - (ii) Compensation under s 123(1)(c)(i) of the Act.
- (c) If Captain O’Neill is successful in all or any element of his personal grievance claims, should the Authority reduce remedies awarded for any identified contributory conduct?
- (d) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[9] Captain O’Neill, an experienced expert mariner, commenced employment as an unlimited marine pilot at Port Otago in November 2006 after relocating from the United Kingdom where he had worked in the maritime industry since 1972. He latterly reported to Captain Bolt from early 2021, then General Manager Marine. Captain Bolt is also an experienced expert mariner and former harbour master and unlimited marine pilot who has also held various senior managerial port roles in Australasia and had worked for Port Otago since 2016. Captain Bolt has worked in the maritime industry since 1976.

[10] As context, tension arose between the pilots and Captain Bolt in November/December 2020 over an issue involving safety concerns about piloting a 190-metre bulk-carrier vessel and berthing it in the upper Otago harbour. Captain O'Neill was aware of the issue in dispute but not a participant in discussions as he was at the time on bereavement leave. Suffice to say, Captain Bolt says he respected the pilots' reluctance to operate the size of vessel in question even though he thought there was no safety risk and he resolved after discussing the matter with Mr Winders (CEO), to re-engage a recently retired and experienced pilot to undertake the disputed piloting task at hand. Captain Bolt conceded he did not discuss this decision with the pilots or specifically apprise them of his decision.

[11] The disputed vessel was piloted by the Casual Pilot without incident in the upper Otago harbour on 21 December 2020. Captain Bolt also resolved to utilise the Casual Pilot on an ongoing casual basis to cover leave and absences and crucially to conduct grade assessments of pilots seeking to enhance their licencing status to 'unlimited.'

[12] The Casual Pilot was a former chief pilot and held in high regard by Captain Bolt as previously they worked together in managing the marine environment. Latterly, Captain Bolt had incorporated the chief pilot responsibilities into his role. Captain Bolt described previous negative interaction between Captain O'Neill and the Casual Pilot and that Captain O'Neill had made it clear to him that he did not hold the Casual Pilot in high regard. Captain Bolt described the two as totally different personalities with Captain O'Neill being described by him as an extrovert and the Casual Pilot an introvert, who tended to be isolated from the pilots' group but was very hard working, professional and 'a company man'.

[13] Captain O'Neill says he became aware of the Casual Pilot's re-engagement in mid- January 2021 when he returned to work after leave and was later apprised by Captain Osborne of the intention of Captain Bolt to utilise the Casual Pilot for assessments. Captain O'Neill and Captain Osborne are friends outside of work and Captain Osborne says he was aware of Captain O'Neill's concerns about the Casual Pilot being re-engaged and the difficult and longstanding interpersonal relationship issues between Captain O'Neill and the Casual pilot. These difficulties involved other pilots who were a fairly 'close knit' group but it emerged that the enmity between Captain O'Neill and the Casual Pilot was deep-seated.

[14] Captain O'Neill was of the strong belief that the Casual Pilot's initial re-engagement was inappropriate for a range of safety reasons including that he was 'rusty' in piloting large vessels and Captain O'Neill considered commercial concerns had been placed above pilots' expressed safety issues. On the evidence, I formed the view that the safety concerns were marginally overstated and the issues were more nuanced involving Captain O'Neil's perception of the Casual Pilot based on past interactions and a strong belief it was a retrograde step to re-engage him.

24 April incident

[15] Captain Bolt says shipping orders that were issued to pilots on Friday 23 April identified that the Casual Pilot would be conducting a practical, observational assessment of Captain Osborne on an incoming vessel that Captain O'Neill was piloting the next day. This meant that all three pilots were to be on the vessel. Captain Osborne effectively being the trainee and Captain O'Neill the pilot in charge. Captain Osborne stressed in evidence he had no concerns about the Casual Pilot being his assessor and he respected his professional competence and found him helpful during and after the successfully completed assessment.

[16] Despite the shipping order, Captain O'Neill recalled not being specifically aware that the Casual Pilot was doing an assessment he was involved in, until he travelled to the port early Saturday morning and met Captain Osborne before boarding the harbour launch to transport them out to board the incoming vessel moored at the harbour heads. Captain Osborne affirmed that Captain O'Neill seemed surprised and immediately annoyed by the Casual Pilot's presence.

[17] There was a verbal altercation before they got on the launch between Captain O'Neill and the Casual Pilot, the extent and duration of such was disputed. Captain Osborne says that Captain O'Neill had some stern words with the Casual Pilot bluntly expressing his view that he had retired, was the least qualified pilot to undertake the assessment and should keep out of his way during the piloting task he (Captain O'Neill) was about to undertake. Captain Osborne says in response, the Casual Pilot suggested Captain O'Neill take the issue up with Captain Bolt.

[18] Captain Osborne says the initial exchange as they boarded the launch was brief but there may have been another comment or two made during the launch trip by Captain O'Neill in which he made it clear that the Casual Pilot keep out of his

way when they later were to board the incoming vessel. Captain Osborne recalled he did have cause to check with the Casual Pilot if he was ok to proceed with his assessment. In evidence, Captain Osborne described the exchanges on the launch as blunt and that Captain O'Neill was forceful in his communication and not pleasant to the Casual Pilot. However, Captain Osborne did not consider it to be a major issue.

[19] Captain O'Neill conceded during the Authority investigation that he swore at the Casual Pilot (an admission not made during the employer investigation) and was not diplomatic with him but denied that he persisted in negative discourse during the whole launch trip (that took around 30 minutes). Captain O'Neill recounted an exchange when he later boarded the vessel to be piloted. making it clear to the vessel captain, he was the pilot in charge and the Casual Pilot was an observer. I note the shipping order indicated that the vessel's captain had already been apprised the assessment would take place by a prior email.

[20] By contrast, the launch captain, Francis O'Neill (no relation to Captain O'Neill), recalled a "very heated" discussion between Captain O'Neill and the Casual Pilot; that Captain O'Neill was using a raised voice – he was angry; the exchange that was largely one-way, started before the launch set off and it was ongoing and repetitive throughout the trip. Francis O'Neill said Captain Osborne had to check with the Casual Pilot if he was ok to carry out the assessment. Francis O'Neill said he could not comment on whether the Casual Pilot felt bullied but recalled him being very quiet at the end of the trip. Francis O'Neill's view was that the exchange was not a minor event and was a 'row'. Francis O'Neill commented that he observed generally that the parties had vastly different communication approaches and that the Casual Pilot was a man of few words and Captain O'Neill was a 'polar opposite'. In somewhat colourful terms, Francis O'Neill described the scene as "the boys were throwing the haggis about".

[21] Francis O'Neill confirmed he socialised with neither party and in his role he reported to the Harbourmaster.

The 'wooden stake' email and draft letter

[22] On the afternoon of Saturday 24 April 2021, upon completing his piloting task, Captain O'Neill emailed his co-pilots highlighting his concerns about the

Casual Pilot's involvement in grade assessments and his surprise at finding him on board that day (having missed the reference in the shipping orders). He noted when boarding the vessel to be piloted he had introduced the Casual Pilot "merely as an 'observer'".

[23] Captain O'Neill commented he was "amazed that pilots have not risen up in objection" and he signalled an intention "to write to Sean Bolt (the Harbour Master too) noting all my objections. How easily we forget our own past." He concluded:

I will draw up a rough draft of said letter for your prior perusal. I would hope to have universal support in this important matter, because management will always look for even the tiniest of cracks to exploit. As the old saying goes, united we stand, divided we fall.

Watch this space.

[24] The email was headed with the Casual Pilot's name and then the exposition "need for wooden stake". The usage of this term later became a significant issue for Captain Bolt. However, whilst understanding Captain Bolt's concern, I accept Captain O'Neill's explanation (and his colleagues' assessment of this) that it was a flippant term, used in jest.

[25] A couple of hours later Captain O'Neill emailed the pilots a draft letter addressed to Captain Bolt headed concerns about the Casual Pilot's role. Despite seeking support for the letter, it is clear by the first-person language used that it was a letter from Captain O'Neill – it concludes in reference to the Casual Pilot: "I have no trust and confidence in him. I cannot and will not work with him in future".

[26] The formulation of the letter before sending was an issue for Port Otago. It was claimed that Captain O'Neill sought support in the form of a collectively signed letter, did not obtain this support after an informal meeting he convened and, that he later did not fully disclose his assumed initial intention to Port Otago.

[27] On reviewing evidence, it was not clear that a collective letter signed by all pilots was Captain O'Neill's intention but it is clear he sought support from co-pilots for his personal letter and the stance he was taking. A text from Captain O'Neill of 27 April, suggests some discussion occurred about it being a collective letter but he resolved it by stating:

Gents. I will send the letter as written. It never required your signatures only your Solidarity. We must never ignore our own history. Above all, respect our profession and each other.

[28] The evidence from pilots, ranged from qualified support for Captain O'Neill's stance to reservations on him personalising his letter and the tone of such. Captain Surendran did not support the letter believing it to be a "personalised vendetta" or "witch hunt" directed at the Casual Pilot. In addition, although he did not communicate this to Captain O'Neill, as he was on holiday at the time, Captain Surendran reasonably had an issue with a reference to himself in the letter, allegedly being the subject of discrimination by the Casual Pilot, whilst he was progressing his unrestricted pilot status.

[29] Captain Bolt disclosed that on or around 24 or 25 April, he got a call from Captain Surendran who advised him that Captain O'Neill was on the 'warpath' and was trying to get support from the other pilots for a letter seeking to get rid of the Casual Pilot. Captain Surendran was in a very difficult position as he is a close friend of Captain Bolt. Both claimed that the initial discussion went no further than indicated and that the 'wooden stake' email was not disclosed to Captain Bolt at this point. I reasonably infer however, that Captain Surendran indicated an email was circulating.

[30] Captain Surendran also disclosed he had been in contact with Captain Holmes another senior pilot, to discuss some misgivings about Captain O'Neill's approach (misdemeanors that Captain Holmes did not fully share).

The letter and the Casual Pilot's complaint

[31] The letter was finalised and emailed by Captain O'Neill to Captain Bolt at 11:15 am on 27 April, it was essentially unaltered from the circulated draft version and copied to all the pilots. An email accompanied the letter stated: "The letter is mine alone". Objectively, the letter was professionally disparaging of the Casual Pilot's capabilities.

[32] In a parallel development, Captain Bolt says the Casual Pilot called him on either Sunday 25 April or Monday 26 April (ANZAC day), to complain about Captain O'Neill's negative discussion with him on the launch trip of 24 April. No notes were made of this conversation and Captain Bolt recalled that he then asked the Casual Pilot, to come in and see him to discuss the matter further.

[33] Captain Bolt then before meeting the Casual Pilot, had a telephone conversation with Francis O'Neill, recalling it to be on 26 April. No notes were taken of this conversation. Francis O'Neill says he related what had happened on the launch to Captain Bolt and was asked to come in for an interview. Around this time, Captain Bolt says he discussed how the matter should proceed with Ms Walton who advised it was a potential bullying and harassment issue and that they should obtain a formal written complaint before commencing an investigation.

[34] On 27 April, the Casual Pilot met with Captain Bolt and discussed his concerns about the launch trip. Captain Bolt recalled he appeared upset and related events on the launch trip but no outcome was sought by the Casual Pilot so he advised that his complaint had to be made in writing. It was not clear that Captain Bolt had already received the letter from Captain O'Neill by this point in time but he conceded he did not disclose or discuss it with the Casual Pilot then (or later). No notes were taken of this meeting.

[35] When asked if an informal resolution option was discussed (such as suggesting the parties meet to resolve their differences), both Captain Bolt and Ms Walton said it was not considered. Captain Bolt indicated that the combination of the call from Captain Surendran and the receipt of the letter from Captain O'Neill and its content, so outraged him he resolved an investigation was necessary and that was also Ms Walton's view.

[36] By email of around 11 am to Captain Bolt on 28 April, headed "Notification of incident on morning of the 24th of April 2021", the Casual Pilot detailed his concerns. The email briefly related what he recalled happening during the launch journey saying Captain O'Neill had initially asked him why he was there and he responded by indicating Captain Bolt had asked him to conduct Captain Osborne's assessment. He then related that Captain O'Neill appeared angry and stated he (the Casual Pilot) had retired and should not be involved in the process. The Casual Pilot detailed that his response was if Captain O'Neill was concerned, he should take it up with Captain Bolt. He then said Captain O'Neill did not let it go and asked why he could not conduct the assessment – he said he responded again with the matter should be discussed with Captain Bolt. He further stated Captain O'Neill appeared "angry at this and his body language reflected this" and that the exchange was overheard by the launch master (Francis O'Neill) and a deck hand.

[37] The Casual Pilot then related that when they boarded the vessel to be piloted, Captain O'Neill intimated to him that he "should keep out of his way on board and should not interact or offer any comments I should be an observer" and he had responded by agreeing this was "normal practice" accepting Captain O'Neill retained the responsibility for oversight of Captain Osborne during the assessment.

[38] The Casual Pilot noted he had later received a text from Captain Osborne apologising for the conduct of Captain O'Neill. The email concluded:

I wish to tender a Formal Complaint against Hugh O'Neill for his actions and attitude towards me on that morning when performing a requested task.

Hugh O'Neill did not understand the process for Pilot Assessment which has been in place for sometime.

I discussed the above incident in a conversation with Sean (Captain Bolt) on Tuesday 27 April whilst I was at Port Chalmers to undertake a Covid 19 test.

[39] On 28 April, Francis O'Neill recalled meeting Captain Bolt and Ms Walton and he says he was shown a copy of the Casual Pilot's complaint email by Ms Walton to read and asked what he thought of this and he responded, "pretty much how it happened". No notes were made of this exchange and neither Captain Bolt nor Ms Walton recalled the exchange. I prefer Francis O'Neill's evidence on this point.

[40] Captain Osborne indicated that a few days after his assessment (on or around 27 or 28 April) Captain Bolt in the office, advised him the Casual Pilot had made a formal harassment complaint about Captain O'Neill and he was obliged to investigate it. Captain Osborne says he openly laughed at this and said there was in his view, nothing that crossed the line of harassment during the assessment and there was no issue. Captain Osborne said he did text the Casual Pilot after his assessment but could not recall Port Otago asking for a copy of this text that he disclosed as stating "... many thanks and apologies for the awkward start to the job with HO. Enjoy your weekend". Despite not mentioning it in his written brief or response to Captain Osborne's written brief, Captain Bolt confirmed the initial conversation had taken place and that Captain Osborne had said it was 'much a do about nothing'.

The investigation

[41] Upon resolving a formal investigation was required, Captain Bolt says he relied heavily on Ms Walton's advice on how it should proceed. Ms Walton drew up terms of reference for the investigation. Captain Bolt recalled they did not initially discuss what bullying was or any Port Otago policy they would follow but Ms Walton was convinced this was an investigation of bullying behaviour.

[42] An initial letter to Captain O'Neill of 29 April was drafted by Captain Bolt with Ms Walton's assistance. It was entitled "Alleged Bullying (victimisation) towards (the Casual Pilot)". The allegations were described as "relating to an incident on 24 April 2021 on the Pilot launch" prior to boarding the vessel to be piloted. Captain Bolt and Ms Walton were described as leading the investigation and a meeting of 3 May was suggested, at which Captain O'Neill was entitled (and encouraged) to be represented. An employee assistance programme (EAP) referral was also offered.

[43] The letter attached the Casual Pilot's emailed complaint and terms of reference – no feedback on the latter was sought. The terms of reference (TOR) in summary included that:

- It was a "fact finding" investigation to determine if the "allegations outlined in the complaint are substantiated".
- It would be "as is possible" impartial and confidential.
- Port Otago would determine the scope and who should be interviewed.
- Appropriate bullying and harassment policies would be followed.
- The complainant would be promptly advised of the process and Port Otago "will first interview the Complainant and better understand the nature of the allegations in the complaint".
- Port Otago would interview the subject of the complaint after "others have been interviewed".

- “After our initial meeting” Port Otago would “review documentation in detail and then compile a list of those to be interviewed. The two parties may want to add additional people to the list”.
- An initial summary report was to be prepared including “further comment on relevant matters”.
- The findings on the allegations would be assessed “on the balance of probabilities”.
- If the findings were that bullying and harassment had occurred “with reference to appropriate policy and definitions then the collective agreement disciplinary process would be invoked.
- Confidentiality, access to support and an EAP were stressed.

Initial observations of letter initiating the investigation and TOR

[44] The “allegations” were expressed in broad terms. The letter did not disclose any specific policies the investigators intended to rely upon. No process for how the investigation would be conducted was provided.

[45] No decision-maker is identified and no thought was given to the appropriateness of Captain Bolt conducting the investigation. The initial heading categorised the allegations as bullying and victimisation before the investigation commenced.

[46] The evidence later demonstrated that a key procedural step did not occur – the stated order of interviewees was not adhered to - the Casual Pilot was not interviewed first to ascertain the scope of his complaint and what he was seeking, which could have included exploration of informal and low-level resolution. In explanation, Captain Bolt referred to his initial informal and undocumented interview and his belief that the emailed complaint was sufficient.

[47] Ms Walton could provide no explanation why the Casual Pilot was not initially interviewed. Despite neither referring to formally interviewing the Casual

Pilot in their written evidence, the later summary of the investigation report dated 21 June 2021 prepared by Captain Bolt and Ms Walton, detailed bullet points from a later interview with the Casual Pilot on 8 June. No verbatim notes were taken of this interview and Ms Walton could not recall it. I consider from Captain Bolt's evidence and recall of this meeting, that it did not involve Ms Walton. Captain Bolt later produced for a common bundle of documents his very brief written notes of the 8 June meeting that demonstrate he went over the events of 24 April with the Casual Pilot. There is no mention in the notes of the 24 April email or the 27 April letter from Captain O'Neill to Captain Bolt.

[48] As discussed later, the accuracy of note taking and the failure, at the time, to disclose any witness interview notes to Captain O'Neill is problematic for Port Otago.

3 May investigation meeting

[49] On 3 May 2021, accompanied by Mr Lane as a support, Captain O'Neill met with Captain Bolt and Ms Walton. Initially, Captain O'Neill asked that the meeting be recorded but this request was denied. This subsequently led to a lack of accuracy in recording the meeting. However, after sharing the typed meeting notes with Captain O'Neill and receiving feedback, an agreement was reached on a non-verbatim record. Lex Lane confirmed that he believed the final minutes were "a pretty accurate record." The final agreed version showed in summary, that before being questioned Captain O'Neill was:

- Apprised of the role of the two investigators (as factfinders and arbiters of whether "the allegations outlined in the complaint are substantiated").
- Informed Ms Walton was the note-taker and that taping the meeting was not an option.
- Told the Casual Pilot was aware of the process and that Captain Bolt had already "interviewed/spoken to" him "first to better understand the nature of the allegations in the complaint."
- Apprised confidentiality was at issue and EAP services were offered.

[50] The notes record Captain O'Neill raised a concern of Captain Bolt's lack of impartiality with reference to Captain O'Neill's letter being both critical of Captain Bolt and the Casual Pilot – no response from the investigators to these issues is recorded.

[51] Captain O'Neill's answers to pre-prepared questions are then detailed. They start with a general exploration of the working relationship between Captain O'Neill and the Casual Pilot, before moving on to an open question about the 14 April "alleged incident".

[52] In response, Captain O'Neill read a prepared written statement. This did not specifically recount in detail events of the launch trip and included a suggestion that: "We left the ship and parted in a jovial mood." Captain O'Neill refuted the Casual Pilot's complaint as set out in the complaint email. He accepted there had been a frank discussion starting with: "Why are you here?" and concluded with a suggestion that frank exchanges of contesting views were commonplace, could not be construed as "Bullying/Harassment" and that pilots tended to hold strong opinions, expressing them forcibly and that this was an essential part of their role.

[53] The investigators then asked specific follow up questions that elicited answers in summary, that Captain O'Neill:

- knew before the launch incident that the Casual Pilot had been appointed Captain Osborne's assessor but had put this fact aside in his mind and, had been surprised when the assessment proceeded with the Casual Pilot presenting for the assessment;
- had told the Casual Pilot to keep out of his way on the vessel but viewed that as standard practice when an observer was present;
- he was "not happy" about the situation (when asked if he was angry about the Casual Pilot's presence) and had told the Casual Pilot he was retired and should not be involved in assessments and advised him he was going to write to Captain Bolt about this;
- the launch trip was approximately 35 minutes; and:

- he had not continued to dispute issues with the Casual Pilot throughout the launch trip (only at the initial stage of the journey), had remained seated and his tone of voice was “normal”.

[54] The meeting without warning, switched to Captain O’Neill’s letter of 27 April.

[55] This subject was outside the investigation’s terms of reference and Captain Bolt did not disclose that Captain Surendran had already briefed him on the email circulating amongst the pilots.

[56] Captain O’Neill initially explained the purpose behind circulating the letter was to make the newer pilots (Captains’ Osborne and Surendran were cited) aware of the past negative history of the relationship between the Casual Pilot and pilots and his view he (the Casual Pilot) was “the wrong person for the job.” Captain O’Neill suggested he was making the complaint on the pilots’ behalf as he was likely to lose his job because he did not wish to get a Covid-19 vaccine and that his view was the Casual Pilot “should be the last person doing that role (assessments)” and that he (Captain O’Neill), was qualified to make this judgment.

[57] Captain Bolt then persisted with more directed questions – asking how copying the letter would impact on the relationships between the pilots’ and the Casual Pilot - to which Captain O’Neill retorted they were all strong minded and: “The pilots are aware these are my views.”

[58] The next two, seemingly innocuous questions, from Captain Bolt, were later crucial to the disciplinary outcome. The first: “Did you speak to other pilots before sending me the letter” and: “Did you ask the other Pilots to co-sign the letter/document you wrote? ”.

[59] On the former question, Captain O’Neill said he felt a duty to consult the other pilots because he perceived the Casual Pilot was the “wrong person for the job” and on the latter he indicated: “No I only advised them that I was writing the letter so they knew it was happening.”

[60] I note that during the investigation meeting Captain Bolt disclosed his personal copy of the typed notes of the 3 May meeting, in which he had penned in the margin: “The lie” next to Captain O’Neill’s answer to the question of whether

the pilots had been approached to co-sign the letter. Captain Bolt says he annotated his notes to make ‘The lie’ observation sometime later but before 21 May when the notes were finalised.

[61] Captain O’Neill latterly claimed that he felt ambushed by the issue of his letter and its formulation being raised on 3 May but there was no evidence in the meeting that he raised any objection (nor immediately afterwards). I accept that at the time of the 3 May meeting, Captain O’Neill was unlikely to have appreciated the significance of this issue for Captain Bolt. Captain O’Neill’s written brief also claimed his ‘wooden stake’ email was discussed on 3 May but it is not referred to in the minutes. I accept the evidence that Captain Bolt did not obtain this email until after the 3 May meeting so it was not discussed on 3 May.

[62] The meeting ended with Captain O’Neill affirming he was comfortable to continue working while the investigation proceeded.

[63] At the end of the meeting, Captain O’Neill also signalled he had “other interesting information however, I will hold it in reserve but it backs my position and views”. I observe this premise was not later referred to.

Switch in focus

[64] As further indication of how the investigation’s prime focus switched away from its terms of reference, Captain Bolt says he phoned Captain Surendran the evening after the meeting with Captain O’Neill (3 May) and pressed him to disclose a copy of the email that Captain O’Neill had circulated to the other pilots. Captain Surendran says this placed him in a difficult dilemma and he, on 4 May, resolved loyalty to his friend trumped loyalty to the pilots’ group and he disclosed the 24 April ‘wooden stake’ email to Captain Bolt despite appreciating it was an email of an assumed ‘private’ nature.

[65] I observe Captain Bolt breached the confidentiality of the investigation process on 3 May and he also did not subsequently disclose his source of information to Captain O’Neill or conduct a formal interview of Captain Surendran as part of the investigation. If he had done so, he would have ascertained broader contextual information on the discussion between the pilots about Captain O’Neill’s draft letter.

[66] During the investigation meeting, Captain Bolt says he was outraged by the letter and the tone of the 'wooden stake' email that he literally interpreted as a call to professionally destroy the Casual Pilot's reputation and he considered that was made worse by Captain O'Neill seeking other pilots' support. I observe that whilst the tone of the email was inflammatory and patently unprofessional, the views expressed and how strongly so, would come as no surprise to Captain Bolt including an appreciation that the pilots held a collective view broadly in line with Captain O'Neill.

[67] What became the central theme of Captain Bolt's concern at the initial stage of the investigation (3 May) and Ms Walton concurred with this, was the suggestion that Captain O'Neill had deliberately misled him or openly lied about the extent of his alleged attempts to get the pilots to co-sign his 27 April letter and canvass their support. This, it transpired was based on Captain O'Neill's answers given during the 3 May meeting and a perception of his subsequent lack of explanation. Captain Bolt got it into his head that Captain O'Neill was concealing the extent of his seeking concurrence to the letter from other pilots. Essentially, he thought he was lying by omission. Counsel for Port Otago succinctly put it in submissions that after obtaining the email on 4 May, Captain Bolt and Kate Walton had formed the preliminary view that Captain O'Neill was deliberately misleading them by omitting to refer to sending the 'wooden stake' email and that he had engaged in text chats with other pilots and had called the meeting to garner support for his letter.

[68] However, the extent to which this new concern became part of the investigation and whether it was dealt with in a procedurally fair manner, is at issue. In essence, at the 3 May meeting Captain Bolt it could be argued, withheld the extent of his knowledge and the primacy of his concern and in contrast, Captain O'Neill failed to fully explain and omitted to describe the meeting with pilots and disclose email exchanges. What Captain Bolt already knew, was Captain O'Neill had copied the 27 April letter to all pilots in draft and final form.

[69] I observe that given the above concern that they had been deliberately misled, that later formed a significant component of the decision to dismiss (as confirmed in evidence by Captain Bolt), the allegation should have been squarely put to Captain O'Neill before the 3 May meeting and it should have been included in the terms of the investigation and, then properly investigated (i.e., all pilots should

have been interviewed). The problem for Port Otago, is Captain Bolt became fixated on an issue that was a personal concern - albeit a legitimate concern. Captain Bolt also appears to have been partially influenced by Captain Surendran's view of the situation. This is encapsulated in Captain Surendran's email to Captain Bolt of 4 May, that was only disclosed during the lead up the investigation meeting. The email in full, with a subject line: "(Casual Piot) - need for wooden stake" attached Captain O'Neill's email and contained the following comment from Captain Surendran:

Hi Sean

This is the first email that HO sent us all ...

Then when he did not seem to get support he had asked for, he went about it on his own (I didn't know he was going to send the e-mail the night that you and I had a chat).

Hope this helps clarify the sequence of events and our discussion.

If there is anything else I can help you with, just ask - I however would hope and pray that HO will back down and take the higher moral ground. To not succumb to the clutches of his personal pride/vanity/arrogance even. He is not a bad sod, just needs a reminder every now and then to 'pull his head in'!

Cheers

Sumanth

The investigation proceeds

[70] On 26 May, Captain Bolt and Ms Walton interviewed Captain Osborne and Francis O'Neill despite the terms of reference indicating they would be interviewed before Captain O'Neill was interviewed. The records of the interviews were not disclosed to Captain O'Neill at the time and both interviewees say they were not shown a record of their own interviews to confirm their accuracy. Ms Walton confirmed the latter, claiming neither party had asked to see a record of their meetings but then properly conceded it was poor investigation practice. This was an unfortunate and significant oversight and during the investigation meeting, Port Otago disclosed handwritten notes taken by both Captain Bolt and Ms Walton.

[71] Francis O'Neill confirmed that retrospectively viewing the notes of his interview and his recollection of the launch trip, he thought the notes were accurate. However, it was not established that Captain Osborne's statement was put to Francis

O'Neill for comment on their different perceptions as to the seriousness of the incident.

[72] Captain Osborne questioned the accuracy of the notes of his 26 May interview but conceded his recollection of the launch trip being tense was not inaccurate. Captain Osborne says he was not shown the Casual Pilot's complaint email or other witnesses' accounts of what occurred on the launch.

[73] Ms Walton and Captain Bolt took notes that did not produce a verbatim account. The typed notes were in the same format as Captain O'Neill's interview notes and contained pre-prepared questions (some of which answers were not recorded). The first part of the meeting asked Captain Osborne to describe his recollection of the 24 April launch incident and he largely confirmed Captain O'Neill's version of events that in contrast to Frank O'Neill's evidence, the altercation was brief and at the beginning of the launch journey then an interchange as they boarded the vessel to be piloted.

[74] While questions were asked about Captain O'Neill's tone of voice and body language no questions were asked about the Casual Pilot's tone of response or body language. Captain Osborne when asked by Port Otago's counsel during the investigation meeting – did he still think the launch incident was minor ? – responded in the context of seafarers exchanges it was very common for them to speak their mind in a blunt manner. He said Captain O'Neill had been unpleasant but did not cross a line.

[75] Port Otago not unreasonably in my view as he was neutral, preferred Francis O'Neill's recollection of the exchanges on the launch that Captain O'Neill adopted a 'heated tone' to the discourse. I however, caution that as Francis O'Neill was at the time piloting the launch it was likely he may only have observed the demeanour of both parties and noticed the level of the exchange rather than being able to recount all words used.

[76] The meeting with Captain Osborne then strayed from the terms of reference by Captain Bolt inquiring had Captain O'Neill asked him to support a campaign against the Casual Pilot and did he ask you for your signature on the document? Captain Osborne confirmed: he had been shown a draft of the 27 April letter; "the intention was to gather team support", a coffee meeting had been called and "if HO

intention was to get a group signature it (the letter's content) didn't build consensus". Captain Osborne is then recorded as saying "HO preference was to send personally not on behalf of the group". This latter response was arguably consistent with Captain O'Neill's explanation and the totality of later disclosed exchanges between the pilots.

[77] I also note contrasting the two sets of handwritten notes of Captain Bolt and Ms Walton produced at the investigation meeting, that Captain Osborne's answer was editorialised. Neither recorded him saying if HO's intention was to gather group signatures – the handwritten notes said "intention was to gather team support" not signatures.

[78] I observe that no follow up questions were asked such as ascertaining who attended the pilots' coffee meeting or what was discussed. This was a crucial oversight, as Captain Surendran did not attend the coffee meeting yet his evidence on Captain O'Neill's intent to seek pilots' signatures appears to have been preferred. Text exchanges between Captain Surendran and Captain Holmes suggested Captain Holmes, who also did not attend the coffee meeting, had wrongly thought Captain O'Neill was seeking group signatories to his letter (the texts were only disclosed during the investigation process by Captain Surendran but if Captain Surendran and/or Captain Holmes had been interviewed the texts would more than likely, would have been available to the investigators).

[79] In evidence during the investigation meeting, Captain Osborne was adamant that he told Captain Bolt that Captain O'Neill did not ask any of the pilots to sign the 27 April letter or indicate that was expected of them. Captain Osborne also says Captain Bolt challenged his view of this during his 26 May interview. I pause to observe that Captain Osborne's evidence was consistent with documentation that showed Captain O'Neill was seeking universal support for his expressed views (i.e., the content of the letter) rather than signatures to a group letter.

[80] It is arguable that Captain Bolt objectively knew this was as far as it went, when he obtained the wooden stake email on 4 May but he appears to have read more into it. I accept Captain Bolt's concerns were reasonably and genuinely held but the failure to expand the investigation and by contrast, continue to read the worst possible interpretation of the email and Captain Surendran's selective disclosure of emails, evidence's that the investigation was not fair and thorough. This was

compounded by not providing Captain Osborne an opportunity to affirm or correct the record of his investigation interview.

Health and safety incident

[81] To add complexity on 24 May 2021, Captain O'Neill was involved in a serious health and safety incident. This involved Captain O'Neill whilst awaiting transport from a recently completed job, straying away from a marked pathway into an operational area at the port where a straddle carrier crane was operating. The crane operator had cause to sound his horn to alert Captain O'Neill he was in danger. Captain Bolt was made immediately aware of the incident and accompanied Captain O'Neill to a compulsory drug test (that was negative). The incident was logged in Port Otago's reporting system and Captain Bolt deputed Gavin Schiller to investigate. Later, after an investigation finding that Captain O'Neill was culpable, a disciplinary process was conducted by Kevin Winders (given Captain Bolt was dealing with the 24 April incident).

Bullying (victimisation): proposed disciplinary outcome

[82] In a telephone conversation of 22 June, Captain Bolt alerted Captain O'Neill that the disciplinary investigation over the Casual Pilot issue had reached an adverse conclusion and that a further disciplinary investigation of the health and safety matter was going to proceed.

[83] In a letter of 22 June 2021 (emailed on 23 June) and headed "Bullying (victimisation) towards (Casual Pilot)- Pilot Investigation Outcome and Proposed Disciplinary Outcome", Captain Bolt communicated to Captain O'Neill that Port Otago had completed their formal investigation of the complaint made by the Casual Pilot. The letter referenced a "Formal Investigation Summary Report" that was not immediately disclosed.

[84] Under a heading of "Findings" the letter stated in summary that:

- the Casual Pilot's claims of harassment and bullying are substantiated they had met the Worksafe New Zealand Guidelines due to the behaviour "being substantiated as repeated, unwelcome, and unsolicited intimidating behaviour; and:

- “It appears that you may have deliberately tried to mislead Kate and I which, if proven to be true, may raise issues of trust and confidence.

[85] Then the letter’s: “Recommendations,” declares as per the “Port Otago Harassment and Bullying Prevention Guidelines and Policy” the possibility “that you may have deliberately tried to mislead” means a disciplinary process would commence. Confusingly, under the same recommendations heading, the letter then suggests Captain O’Neill had specifically “undertaken the following”:

- During the investigation process, it is alleged that an email on Saturday 24 April 2021 to several Pilots titled “need for wooden stake”. It is alleged that you advocated for support from the other Pilots to your disparaging views on (the Casual Pilot).
- It is alleged that you facilitated a meeting with some of the pilots to gather support for your agenda to get rid of (the Casual Pilot). It is alleged that you were unable to garner sufficient support from the other Pilots to co-sign your letter to me.
- It is alleged that on Tuesday 27 April 2021 you sent an email to me of which you copied in seven other Pilots and one retired Pilot. The letter attached to your email titled “Concerns about (Casual Pilot’s) role” was derogatory towards (the Casual Pilot) and, in copying in other Pilots, undermined his reputation.
- During the investigation process you told us that you advised the Pilots that you were writing the letter to me and it was on your own volition and that you hadn’t canvassed the other pilots for support which was clearly incorrect.

[86] The letter proceeds to say if further allegations “are proven true” trust and confidence is at issue but then it is “alleged” that:

.... the findings of facts of the formal investigation together with the additional information that we have found during the investigation process in the absence of a satisfactory explanation from you, amount to Serious Misconduct.

[87] A meeting of 24 June is then suggested before “making any final decision” to hear Captain O’Neill’s views and responses to further allegations. A warning was given that disciplinary action may include dismissal. It then indicates a copy of the Formal Investigation Summary Report would not be provided until the 24 June meeting and that Captain O’Neill and his representative, would also have to sign a confidentiality undertaking before the report was disclosed.

[88] Captain O'Neill responded by email of 23 June, advising Captain Bolt he had been "very much taken aback" by their 22 June phone conversation and had assumed the delay in completing the investigation (seven weeks) had meant matters had "blown over". Captain O'Neill said he could not meet on 24 June as he needed more time to prepare and organise legal representation.

[89] Captain Bolt replied on 23 June, acknowledging the update and asked Captain O'Neill to let him know when the meeting would proceed and then disclosed: "On another matter ... where you wandered into an active Terminal area", Gavin Schiller, the Head of Safety would be investigating and would be in contact soon.

Comment

[90] I observe Port Otago's 22 June is conceptually unclear. It mixes up findings from the investigation and then introduces new allegations. The most controversial was a confirmation that the investigation had strayed outside its terms of reference to deal with the actions of Captain O'Neill prior to him sending his 27 April letter. A letter that was not disclosed to the Casual Pilot and not part of his complaint. As part of this discreet inquiry, it became evident that Port Otago had obtained a copy of Captain O'Neill's 'wooden stake' email to the other pilots. Captain Bolt had obtained a copy of this email on 4 May but had inexplicably not disclosed it was in his possession until he sent the 22 June letter and even then, he disingenuously presents it as an allegation that Captain O'Neill sent the email when he already knew he had. When asked why he had not simply disclosed he had the email before finalising the 3 May meeting notes, Captain Bolt says it was "kept up my sleeve". Captain Bolt also confirmed he had formed the view he had been misled when he got the wooden stake email on 4 May.

[91] Captain Bolt then despite not interviewing the other pilots, presented fresh allegations that Captain O'Neill was engaged in an inappropriate attempt to secure their support for his personal agenda concerning the Casual Pilot. This latter set of allegations was central to Captain Bolt's belief that he had been misled at the 3 May meeting. This turn in the investigation is beset with problems for Port Otago.

[92] The subsequent timing of the start of the health and safety investigation was also not ideal or timely (given the incident occurred on 24 May). Captain Bolt says the delay was due to him having to attend a family matter.

The suspension

[93] By email of 24 June, Captain Bolt indicated to Captain O'Neill:

As per our telephone conversation and given that you are currently the subject of two investigations and a disciplinary process, and given your advice you couldn't meet today as you wished to seek legal representation, you are now relieved of piloting duties until the disciplinary process is concluded.

You will remain on full salary.

[94] The wording of the email is unfortunate. It reads, as one of the justifications for suspension, was Captain O'Neill not being able to meet before he sought legal advice. In addition, this was not a proposal to suspend seeking Captain O'Neill's comment before it was enacted nor was there a provision in the relevant collective employment agreement authorising a suspension. Captain Bolt's evidence was that standing Captain O'Neill down compassionately recognised he was under stress and potentially unable to concentrate on complex and demanding piloting duties. This was a reasonable view.

[95] In a subsequent letter of 28 June, the General Secretary of the NZ Merchant Service Guild (the union) detailed concerns about events so far. It is noted the union's letter did not contest the suspension on procedural or substantive grounds. In fact, no reference was made to a suspension just a comment that Captain O'Neill "is currently relieved off duties due to sleep problems and stress caused by the ongoing process."

[96] It was evident initially, while poorly communicated, the relieving of piloting duties was appropriate, mutual and the union's observation above, tacitly endorsed this. Captain O'Neill's counsel in submissions, suggested sick leave or compensation were better measures to meet the distress that Port Otago had occasioned. Pragmatically, I disagree with this suggestion as Captain O'Neill was not financially disadvantaged by being kept on his full salary without the need to diminish his sick leave entitlement and neither option was advanced at the time. In

addition, a further complicating factor was Captain O'Neill was not vaccinated against Covid-19 and he had indicated an intention not to be so.

Other concerns raised by the union

[97] The union's 28 June letter, first sought to justify Captain O'Neill's actions; emphasising that he disagreed with the notion that his exchanges with the Casual Pilot on the launch trip, were "prolonged or repeated" or that his initial questioning of the Casual Pilot had amounted to bullying or harassment. The 27 April letter was explained as justified, as Captain O'Neill on the Casual Pilot's suggestion, had "very properly relayed his concerns" to Captain Bolt in writing. The tone of the letter was not addressed nor Captain O'Neill's adamant refusal to work with the Casual Pilot.

[98] The union then proceeded to contend that there was no evidence that Captain O'Neill had sought co-pilot signatures for his letter and that the investigation report's conclusion of deliberate misleading behaviour based on the 'wooden stake' email had no foundation.

[99] A significant feature of the union's 28 June letter was an observation that Captain Bolt was conflicted in his investigator's role and could not demonstrate an ability to be impartial. This included an observation that he was essentially investigating his own concern that Captain O'Neill had deliberately tried to mislead him. The union suggested to avoid impartiality, Captain Bolt should "withdraw from the process and engage an independent third party to handle this matter". The union concluded their letter with an invitation to meet, subject to Captain O'Neill's availability.

[100] I observe the union's concerns over Captain Bolt's continued involvement warranted careful consideration. However, in evidence both Captain Bolt and Ms Walton conceded they took no legal advice on this issue.

[101] By letter to the union of 29 June, Captain Bolt saw no need to recuse himself from the investigation (or decision making) and posited: "It is common for the decision-maker to also be the investigator. I do not believe my objectivity has been compromised in any way".

[102] Captain Bolt then detailed the basis of his findings in the investigation report and reiterated based on those findings, "it appeared that HO may have deliberately

tried to mislead the investigation”. Captain Bolt then observed he had invited a response to “further allegations” detailed in his 22 June letter and that he “understood” the union’s response was Captain O’Neill’s response to such. Captain Bolt then went on to justify his findings and said:

Just so I am absolutely clear, HO’s reported actions, in combination, appear to be attempts to solicit support for his letter. When I asked him about this he denied requesting other Pilots to support his letter. That appears to be an attempt to mislead.

Apart from the fiction that Captain Bolt’s 22 June letter was advancing ‘new’ allegations, I observe the above exposition of what later became the key issue, departs from the earlier alleged premise that Captain O’Neill sought signatures of co-pilots to his letter. It mischaracterised Captain O’Neill’s actual response to the questions put to him at the 3 May meeting, where he admitted speaking to the other pilots before sending his letter. An admission that I find objectively did disclose that he sought their support and could not be construed as an attempt to mislead.

[103] Captain Bolt concluded his letter by offering Captain O’Neill before he made a final decision, one further opportunity to “respond to the allegation that he attempted to mislead the investigation” either by a meeting or in writing. In the letter, Captain Bolt also explicitly confirmed for the first time, that he was intending to also be the decision-maker.

Commencement of separate disciplinary process over health and safety incident.

[104] By an emailed letter of 1 July 2021, for Captain O’Neill care of his union, Port Otago’s Chief Executive, Mr Winders, set out the findings of Mr Schiller’s investigation, which was Captain O’Neill had breached Port Otago’s Health and Safety rules and placed himself at risk of serious harm. The letter noted a meeting would be convened to hear Captain O’Neill’s view of the investigation findings and “disciplinary action may be taken up to and including termination of your employment”.

[105] At this point in time (2 July), Ms Walton had left Port Otago and Captain Bolt continued the disciplinary process in consultation with Mr Winders.

The union response.

[106] In a response of 5 July to Mr Winders, a suggestion was made by the union that the proposed health and safety disciplinary process in tandem with the investigation Captain Bolt was running, amounted to “retaliatory” actions by Captain Bolt for Captain O’Neill raising safety issues around the piloting of 190m vessels in the upper harbour and impliedly Captain O’Neill’s criticism of the decision to re-engage the Casual Pilot. It was also suggested, without evidence to support such an assertion, that Captain O’Neill had utilised the Protected Disclosures Act in raising the safety issues (a claim that was not subsequently pursued).

[107] The union sought both investigations be discontinued in favour of some dialogue with the pilots around their “wider concerns” and then outlined some justification for this stance including comment on their view of the health and safety incident involving Captain O’Neill that they categorised as an inadvertent breach of protocol.

[108] The union concluded by also alluding to concerns they had raised with Captain Bolt about his investigation process and crucially, the perceived conflict in Captain Bolt both conducting this investigation of a letter that was critical of his own decision-making and the Casual Pilot and, his intention to be the arbiter of Captain O’Neill’s ongoing employment status.

[109] In a response of 6 July, Mr Winders asserted Captain Bolt’s investigation:

Does not relate to the practice of engaging retired Pilots. It relates solely to allegations of bullying and harassment made by (the Casual Pilot) in respect of Hugh O’Neill.

In relation to that complaint, it is not accepted that Sean’s ability to conduct a fair and objective investigation is compromised.

[110] Then in an evident contradiction given the Casual Pilot had not complained of or even been aware of the 24 April letter questioning his re-engagement as a retired pilot, Mr Winders noted Captain Bolt had already written to Captain O’Neill providing a “further opportunity to respond to the allegation he attempted to mislead the investigation” and he asked the union to respond “as a matter of priority” on whether Captain O’Neill was going to make further comment on the allegation he

“attempted to mislead the investigation”. Mr Winders suggested the union’s letter was “silent on that point”.

[111] Mr Winders then sought to refute the suggestion the health and safety investigation was retaliatory or that the Protected Disclosures Act was relevant. Mr Winders then emphasised that the invitation to meet was with him and that: “I will be the decision-maker. Therefore, your criticism of Sean Bolt are not relevant to this investigation”. It was suggested during the investigation that this response led the union to believe Mr Winders had relieved Captain Bolt of his decision-making role.

[112] Whilst not entirely clear expression from Mr Winders, the letter concluded that each investigation would be carried out “independently by a separate investigator/decision-maker”. Combined with the earlier letter seeking a meeting over the health and safety matter and Mr Winders’ affirmation of confidence in Captain Bolt, I find it objectively was not a suggestion that Mr Winder would be the decision-maker on both matters.

Potential confidentiality breach

[113] In an apparent breach of the investigation process, Captain O’Neill’s counsel produced in the common bundle for the investigation meeting, an email from Captain Surendran to Captain Osborne and cc’d to a group of pilots and the union of 6 July 2021, in which Captain Surendran says the actions of Captain O’Neill to the Casual Pilot “have been investigated and found true by the POL senior management. Bullying and harassment raises its ugly head and no management can afford to take that lightly”.

[114] Captain Surendran further observed in his email that the result of the investigation “has warranted the collective’s Serious Misconduct clause be activated”. While I can entertain a view that Captain Surendran may have only been speculating or had been apprised of the stage the investigation reached by Captain O’Neill’s supporters, the language used suggests otherwise and, I find it is more likely than not that he was inappropriately privy to matters that should have been confidential and more worryingly given the timing of the email, it is suggestive of the investigation outcome being pre-determined. However, I do observe Captain Surendran also urged a solution that Captain O’Neill be urged to apologise for his negative interchanges with the Casual Pilot. I stress however, that this email was

not put to Captain Surendran for comment during the investigation meeting. In addition, the union did not, despite being privy to the email, raise concerns about a breach of confidentiality before the decision to dismiss Captain O'Neill was made.

Union's response to Mr Winders' 7 July letter

[115] By a letter of 13 July, the union suggested without elaborating in much detail, that the background and context to the bullying complaint were "highly relevant to these investigations and as such are already grounds for a personal grievance or other legal action". The union again without elaboration, suggested the extension of the investigation to take in the allegation of misleading conduct:

... put both investigations squarely within the realm of the Protected Disclosures Act and (presumed) discrimination under the Employment Relations Act, based on raising the previous issues. We have responded to this point in our letter to Sean Bolt and providing (sic) extracts from the investigation notes/report.

[116] The union then confirmed: Captain Bolt had nothing further to add to his written submission (impliedly the 28 June letter to Captain Bolt); Captain O'Neill was declining the invitation to meet but he was willing to respond to any further questions from Mr Winders, that the union suggested being made in writing.

[117] I observe some confusion may have objectively existed at this point, with the union now addressing Mr Winders over the misleading allegation that was the subject of Captain Bolt's investigation and not specifically addressing the request to meet over the health and safety investigation disciplinary process that Mr Winders had assumed responsibility for concluding.

[118] During the investigation Mr Winders on the specific issue raised by the union of Captain Bolt being conflicted both as an investigator and a decision-maker, was questioned on correspondence where Captain Bolt recounted to him that counsel had accused Captain Bolt of being the: "Prosecutor, Jury, Judge and Executioner" (PJJE). When pressed in questioning during the investigation meeting about counsel's comment, Mr Winders said he just did not accept that he needs to recuse Captain Bolt -he gave it no further consideration.

[119] Mr Winder said even though he understood the term PJJE, it did not prompt him to seek specific legal advice and he also disclosed he took no legal advice on the health and safety matter he was investigating.

[120] Mr Winder says he had full confidence in Captain Bolt's judgment and Ms Walton's input and said he had no expertise in piloting matters as his background was in accountancy and insolvency matters.

Preliminary decisions on both investigations

[121] By way of two letters of 14 July from Captain Bolt and Mr Winders respectively, both partly headed: "Preliminary decision" the following was communicated to Captain O'Neill care of his union:

a) Alleged Bullying and Harassment that:

Hugh's actions constitute bullying and harassment. In addition, we are extremely disappointed that Hugh O'Neill a Senior Pilot has misled (sic) the investigation resulting in a loss of trust and confidence.

As a result of the above the letter indicated a preliminary decision to terminate Captain O'Neill's employment because:

In addition to your conduct being unacceptable to the point that we consider it Serious Misconduct, you appear to have lied throughout the process, in order to avoid the consequences.

The letter then offered a further meeting before a final decision was reached to give Captain O'Neill a further opportunity "to present any clarifying information you believe is relevant to our evaluation of this matter".

b) Alleged Health and Safety Breach: that

.... I view you breached our health and safety protocols. Leaving the designated walkway and entering a busy operating area, exposed you and others to the potential for serious harm or worse, a fatality. I do not accept that you have provided us with credible mitigations for this serious breach

[122] The letter then proposed a final written warning and an invite to meet to hear Captain O'Neill's view of this preliminary decision and an opportunity to present any additional or clarifying information. Both letters reminded Captain O'Neill of his right to be represented and offered EAP counselling.

[123] On the health and safety matter, Mr Winders met with Captain O'Neill on 25 July and Captain O'Neill raised an issue of Port Otago being inconsistent with its approach on similar breaches of health and safety protocols he was facing citing two

instances. The following day, Mr Winders wrote to the union providing a response that challenged Captain O'Neill's cited inconsistencies but in doing so, it invited Captain O'Neill to make a further response before any final disciplinary sanction decision was made. In the event this matter was not progressed any further because the following occurred.

26 July meetings and 27 July internal memo

[124] On 26 July Captain O'Neill accompanied by Paul McBride the union's counsel, met initially with Mr Winders and Captain Bolt. Captain O'Neill recalled that Mr Winders had advised he was the decision maker on both matters and only he had the power to dismiss him. By contrast Mr Winders evidence was he delegated the decision to Captain Bolt on the first matter. I prefer Mr Winders evidence as Captain O'Neill also recalled the meeting then splitting into two with him meeting Mr Winders first to discuss the health and safety issue and then Captain Bolt.

[125] I was not provided with notes of the 26 July meetings and again the issue of recording meetings came up with Mr Winders declining this request.

[126] Mr Winders evidence was he delegated Captain Bolt as the final decision-maker in a conversation. The delegation was not documented and Mr Winders suggested he then had no power to veto Captain Bolt's decision.

[127] On 27 July, Captain Bolt sent an internal memo (subject: Hugh O'Neill) to Mr Winders. The disclosed memo first references the meeting with Captain O'Neill and his counsel of the previous day and states:

I don't believe they offered anything new in terms of altering my preliminary view that HO's actions constituted bullying and that he misled the investigation process and therefore he should have his employment terminated.

At this meeting HO offered no real contrition for his actions, felt he was not at fault in any way and accused me of doing this as retaliation for his letter to me about (the Casual Pilot).

[128] Captain Bolt then noted that counsel had asserted/discussed (in summary):

- Captain Bolt had not carried out a "proper and fair investigation";

- he had failed to act impartially, being “Jury, Judge and Executioner”;
- he was proposing an “excessive” sanction (to which Captain Bolt said he retorted this was because Captain O’Neill had attempted to mislead the investigation); then:
- Captain O’Neill made an offer to apologise but Captain Bolt felt it was insincere and he was taken aback that this was only now being offered;
- Captain O’Neill “categorically denies any attempt to get other Pilots to sign his letter”
- Captain O’Neill contested events on the launch as being akin to a non-event.

[129] Captain Bolt said counsel had also contested the evidence he had gathered to conclude he had been misled but this was in Captain Bolt’s view, in direct contradiction to the content of the ‘wooden stake’ email he had a copy of and, Captain Osborne’s evidence that “HO had called a meeting to gather support to get co-signatories to the letter”. Captain Bolt said he had reviewed a pilots’ group letter of support recently sent to Mr Winders but “in my opinion it offers nothing to my investigation”.

[130] Captain Bolt concluded his memo: “Therefore, I feel I am correct to conclude he attempted to mislead the investigation and have lost trust and confidence in HO”. Mr Winders says the memo was for his information only and a response was not sought.

[131] Captain Bolt and Mr Winders say at some point they discussed how Captain Bolt should approach his decision-making but this was likely prior to the memo being sent. Captain Bolt says he was challenged on the grounds of his preliminary thinking to dismiss and asked had he followed fair process, was he impartial and had he given Captain O’Neill sufficient opportunity to address his concerns. No legal advice was sought at this point.

Findings and proposed disciplinary action and response

[132] By way of a letter of 29 July with the above heading, Captain Bolt communicated his decision to Captain O'Neill via the union. The six pages' letter extensively detailed the history of events and traversed how he had arrived at a proposal to dismiss which he justified as:

Your actions on the pilot launch "*Aramoana*", together with your letter of the 27 April 2021 (copied to all pilots), your email of the 24th of April and your actions to garner support from the other pilots, meet the legal definition of 'bullying' under the Worksafe Guidelines. I find those actions were repeated, unwelcome and unsolicited intimidating behaviour.

Your actions in trying to mislead the investigation also amount to serious misconduct.

[133] Despite the above accumulated issues being expounded Captain Bolt later in his letter said:

I highlighted that it was your apparent attempt to mislead the investigation that led to my preliminary decision to terminate your employment, rather than the bullying and harassment incident. And:

My preliminary thoughts are that your actions in attempting to mislead the investigation are so significant that I do not believe I can have the necessary trust and confidence in you to enable the employment relationship to continue.

[134] Captain Bolt then indicated he was providing a further opportunity for Captain O'Neill:

.... to hear from you on my preliminary thinking that attempting to mislead the investigation gives rise to a loss of trust and confidence and, therefore, in conjunction with my findings of bullying and harassment, that termination is the appropriate disciplinary sanction.

[135] In answering questions during the investigation meeting, Captain Bolt emphasised the range of factors that led to the decision to propose dismissal but acknowledged the centrality of the issue was he felt Captain O'Neill had deliberately misled the investigation and that if it was just the bullying/harassment finding his proposed sanction would have been short of dismissal.

[136] On the same day (29 July), Mr Winders forwarded a letter headed: "Health and Safety – follow up" to Captain O'Neill via his union. This letter summarised defences Captain O'Neill had raised to the finding he had breached health and safety

protocols and concluded by seeking further comment before Mr Winders made a final decision on his proposal to administer a final written warning.

[137] In a response of 30 July to Captain Bolt, Captain O'Neill's counsel unsurprisingly concentrated on the proposal to dismiss. Counsel contended that there was no basis for a finding of serious misconduct and contested the bullying and harassment and misleading the investigation findings.

[138] Counsel also alluded to contextual and personal issues that he thought should have been considered. It is noted in evidence during the investigation meeting, both Captain Bolt and Mr Winders confirmed Captain Bolt's personal circumstances and the impact on him of the dismissal did not form part of their decision-making. This is despite both being aware that Captain O'Neill had been recently widowed and was responsible for the care of two daughters still living at home which made him unable to move from Dunedin and this meant his piloting career was effectively over.

[139] Counsel noted Captain O'Neill remained prepared to apologise to the Casual Pilot and suggested mediation as the next step. Counsel also wrote to Mr Winders contesting the preliminary decision to issue a written warning over the health and safety matter.

[140] Port of Otago agreed to mediation by way of letters of 3 and 4 August from Captain Bolt and Mr Winders. Captain Bolt's letter requested that counsel provide a further response to the concerns he had detailed (essentially the reasons set out for the proposed dismissal) prior to mediation so that they could be discussed during such. The letter proposed Captain O'Neill remained away from the workplace on pay until mediation.

[141] A mediation occurred on 3 September but all matters remained unresolved.

Dismissal finalised

[142] By way of two letters of 8 September 2021 Port Otago concluded matters. Captain Bolt communicated his decision to summarily dismiss Captain O'Neill in a discursive fashion mainly reiterating his 29 July findings, and in part, said he had:

... made it clear that my rationale for termination was that, in addition to your conduct being unacceptable to the point that I considered it serious misconduct, you appeared to have lied throughout the process in order to avoid the consequences.

[143] Captain Bolt comprehensively traversed how he had come to his decision but then noted when he had met with Captain O'Neill and his counsel on 26 July, he observed it was the misleading the investigation and Captain O'Neill's lack of contrition that had led to the decision to dismiss "rather than the bullying and harassment incident by itself". In noting that counsel contended Captain O'Neill's explanation was he had been honest in saying he did not ask for his letter to be co-signed and had openly disclosed he had been speaking with the other pilots about his letter – so they knew it was happening, Captain Bolt reasoned:

However, I advised you, on a number of occasions, of further information I became aware of, to the effect that you had sent an email to the Pilots seeking their support and had called a meeting to obtain their support for your letter to me.

While technically you may not have directly asked the other Pilots to co-sign the letter, it was not truthful to claim that you "only advised them" that you were writing the letter. Your actions went far beyond that.

[144] Captain Bolt then concluded, finding that Captain O'Neill had deliberately attempted to mislead him and Ms Walton:

That is by both stating that you *only advised them* that you were writing the letter and by omitting to disclose (when I was specifically focussed on these issues) that you had called a meeting and sent an email seeking to garner support. I find that behaviour amounts to serious misconduct and, consequently, I can no longer have the necessary trust and confidence in you for the employment relationship to continue.

[145] Mr Winders' letter noted that given the summary dismissal had been communicated by Captain Bolt, it was not necessary for him to conclude the health and safety disciplinary process as "any such decision would be moot".

Assessment - was the dismissal justified?

[146] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be affected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act. In applying this test of 'justification' the Authority cannot substitute its decision for the one of the employer but is entitled to review the facts on which the decision is made to ascertain whether the employer was entitled to conclude the decision was justified. In approaching the evidence, the Authority must assess the substantive fairness and reasonableness of the decision to

dismiss and not engage in minute and pedantic scrutiny to identify procedural failings.¹

[147] Section 103A of the Act details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner. These elements summarised and discussed further below, are:

- (a) Whether the employer properly identified the issues of concern with the employee prior to deciding to dismiss?
- (b) Whether given the resources available to the employer, did they sufficiently investigate the identified concerns?
- (c) Was the employee afforded a reasonable opportunity to respond to the identified concerns?
- (d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss?
- (e) Any other contextual factor the Authority regards as appropriate to consider.

Resources

[148] I observe that Port Otago had no problem with resources and ongoing access to specialist advice during the investigation and disciplinary process. The choice to not seek legal advice on procedural issues around the appropriateness of Captain Bolt undertaking the investigation and being the decision-maker, was a conscious one and objectively unwise.

Identification of concerns

[149] Having viewed the extensive documentation provided, I am persuaded that Port Otago properly identified the specific concerns they later assessed as being grounds for dismissal although this was not so, at the commencement of the disciplinary process and the concerns 'evolved' away from the initial investigation's terms of reference. I however find, the complaint by the Casual Pilot was linked to the content and tone of Captain O'Neill's 27 April letter, and 'in tandem' was sufficient to justify the commencement of a disciplinary investigation.

¹ Section 103A(5) Employment Relations Act 2000.

[150] I have carefully assessed Captain O’Neill’s genuine perception that he was disadvantaged by not having the source of the disclosure of his circulated email to other pilots being identified and, him being presented at the first investigation meeting (3 May) with questions about whether he spoke to and asked the pilots to co-sign his letter. Captain O’Neill says he felt ‘ambushed’ by these additional issues being raised.

[151] While I find that Captain Bolt somewhat inappropriately entrapped Captain O’Neill by not revealing what he already knew, he sufficiently apprised Captain O’Neill of the objectively significant concerns about the circulation of the letter. The actions of Captain O’Neill on the launch trip and the objectively derogatory views he later expressed about the Casual Pilot to Captain Bolt, were clearly interlinked in both timeframe and content. I find it difficult to comprehend why Captain O’Neill would think otherwise – in answering why he sent the letter he disclosed it was because the Casual Pilot had suggested he do so. An obvious overall concern for Port Otago was Captain O’Neill’s concluding comment in his 27 April letter that he, in speaking of the Casual Pilot said: “I cannot and will not work with him in the future”. Curiously, this was not made a central concern by Port Otago.

[152] Overall, I find Port Otago properly identified concerns that Captain O’Neill was allegedly engaging in actions of concern in his interactions with the Casual Pilot. However, as matters transpired in the switch of focus of the investigation as it evolved, it was not appropriate or explicable, why concerns about the 27 April letter were initially not set out in the 29 April invite to an investigation meeting or the terms of reference attached to such. This omission crucially robbed Captain O’Neill of a fuller appreciation of the emphasis Captain Bolt’s would later place on this issue. However, it was argued, with some justification, that Captain Bolt made his specific concern he felt he had been misled, clear and provided Captain O’Neill many opportunities to dissuade him from this supposition. Whether that supposition was reasonable in all the circumstances, is a matter that goes to the substantive justification of the decision to dismiss and is discussed below.

Sufficiency of investigation

[153] My view of the investigation was initially that after identifying the concerns, Port Otago fairly assessed available documentation made available to them and

correctly focussed upon Captain O'Neill's justification for his actions. However, as the focus of the investigation shifted to the circumstances surrounding whether Captain O'Neill had sought signatures of other pilots to his letter, a significant procedural flaw in the investigation arose. That was the failure to disclose to Captain O'Neill the source of Captain Bolt's information (Captain Surendran) and crucially the decision to not interview the other pilots about their communication with Captain O'Neill. Presumably in focusing on what occurred at the coffee meeting Captain Bolt would have been aware that Captain Surendran did not attend such. Thus, the failure to interview the pilots who attended was inexplicable and goes to the sufficiency, scope, and fairness of the investigation.

[154] I have also identified what I regard as sloppy investigation practice that transgressed good faith principles including:

- a failure to document the initial interview with the Casual Pilot and to disclose the 27 April letter to him for comment;
- the displaying of a closed mind to potential early conflict resolution options and an apparent encouragement to the Casual Pilot that he formalise his complaint as the only way forward;
- an unreasonable reluctance to properly record the investigation meeting with Captain O'Neill;
- incomplete note-taking practices and not checking with interviewees the accuracy of such;
- a failure during the investigation, to put and disclose interviewee notes to Captain O'Neill and as discussed, the reliance on an undisclosed witness source.
- A breach of the confidentiality of the investigation terms when Captain Bolt spoke to Captain Sunendran concerning the investigation.

[155] I balance the above, with the observation that the investigation was not rushed and once a preliminary decision had been reached, Captain O'Neill had numerous opportunities to further explain his conduct.

Reasonable opportunity to respond?

[156] Having with reservations, accepted that Port Otago identified their concerns and put them to Captain O'Neill, I consider whether he had a reasonable opportunity to respond.

[157] At all times Captain O'Neill was apprised of his right to representation and he was very competently represented by both his union and counsel. Several issues were raised in mitigation on both procedural and substantive grounds and Captain O'Neill and counsel were afforded opportunities to address the decision-maker.

[158] Once Captain O'Neill obtained union and legal advice, he had ample opportunity and time to focus upon a reflective and more conciliatory approach that, from evidence given by Captain Bolt may have led to different responses, short of dismissal. Captain O'Neill unfortunately chose to not take opportunities provided and demonstrate that he had reflected on his actions. In contrast he sought to either down-play or justify his approach to the Casual Pilot that was objectively inappropriate.

[159] Port Otago also took an appropriately fair approach in conducting a 'two step' process, to first make a preliminary view known to Captain O'Neill by setting out the reasons for such in writing and then they invited Captain O'Neill to make submission to the decision-maker on preliminary findings. This was done on more than one occasion and Port Otago also agreed to attend mediation prior to the dismissal.

Did the decision-maker genuinely consider Captain O'Neill's explanations?

[160] I heard evidence that Captain Bolt as the decision-maker in consultation with Mr Winders, did carefully consider Captain O'Neill's perspective of the situation. I however, consider a real problem existed in the decision-making process once Captain Bolt became fixated on his view that Captain O'Neill misled him during the investigation and the inappropriateness of Captain Bolt conducting the investigation and decision-making.

[161] It was evident Captain O'Neill's offending 27 April letter, was drafted in the first person and Captain Bolt appears to have closed his mind to the fact that at the 3 May investigation meeting, Captain O'Neill freely admitted to speaking to the other pilots before he sent his letter and he openly cc'd the final version to the other pilots.

[162] Despite having no conclusive evidence (as he did not interview the other pilots) Captain Bolt came to an early conclusion that Captain O'Neill lied to him in his response to a question: did he ask the other pilots to co-sign his letter? Captain Bolt confused the concept of Captain O'Neill seeking solidarity from the pilots for the views he was expressing (which he already knew had occurred and was not an unusual concept) with seeking to pen a collective letter. Captain Bolt drew an implication that was not soundly arrived upon, so then switched his focus to Captain O'Neill somehow lying by omission because he did not disclose that he had had called a meeting with the pilots to discuss his letter.

[163] I find it more likely than not, that Captain Bolt closed his mind having convinced himself that the email Captain Surendren disclosed with reference to a wooden stake and the conversations they engaged in, implied he had sought a co-signed letter. Captain Bolt also placed too much emphasis on Captain Osborne's recorded answer during his interview of 26 May that if Captain O'Neill was seeking a group signature, he had not built consensus at the coffee meeting. Captain Bolt seemingly ignored the second part of Captain Osborne's answer that was: "HO preference was to send personally not on behalf of the group". A follow up question would have assisted this but none was made.

[164] I find the omissions in note taking and checking that evidence was accurate, combined with the failure to interview all pilots about the assumption that cosignatories to Captain O'Neill's letter had been sought, rendered the decision to dismiss on the predominant view that the investigators had been misled, to be unsafe.

Other factors

[165] I find the decision not to recuse Captain Bolt from his investigative and decision-making role was inappropriate.

[166] Captain Bolt who I stress cooperated fully with my investigation, did not in my view fully appreciate the apparent level of conflict, unconscious and actual bias

he displayed to Captain O'Neill. Captain Bolt freely conceded his investigation skills were 'rusty' and he relied too heavily upon Ms Walton. Mr Winders also failed to turn his mind properly to an evident conflict Captain Bolt had in both roles and did not seek legal advice.

[167] I also found evidence that Captain O'Neill's personal circumstances were not considered, to be inexplicable given his recent bereavement, residual family responsibilities and his length of service and the known way he expressed himself. The impact on Captain O'Neill's career as a pilot was also not assessed. In addition, a support statement signed by seven pilots including Captain Surendran, that explained Captain O'Neill's forthright advocacy for pilots and emphasised he had "commendably challenged management over many years in an effort to raise safety and professional standards" was disregarded.

[168] To balance the above factors, I observe the behaviour of Captain O'Neill on the launch and the tone of his 27 April letter was confrontational, derogatory, and unprofessional. I also did not detect during the investigation meeting that Captain O'Neill was contrite about his view of the Casual Pilot and seemingly unaware that his employer had the absolute discretion to re-engage him.

Overall finding on the dismissal

[169] I find the various procedural issues I have identified above make the decision to dismiss Captain O'Neill unjustified in applying the justification test under s103A of the Act. The identified procedural deficiencies were not minor and they resulted in Captain O'Neill being treated unfairly.

[170] However, despite Captain Bolt being a protagonist in events, I reject the view that he targeted Captain O'Neill or that there was any ulterior motive in the timing of the parallel health and safety investigation or any discrimination on the grounds of Captain O'Neill being active on behalf of his union. Captain Bolt impressed as a professional, experienced and considered manager who worked in a difficult environment. He should not have been placed by Port Otago in the conflictual position of either an investigator and/or decision-maker in these circumstances. I reject the suggestion made that specialist knowledge of piloting was an essential requirement of an investigator. Port Otago has the resources to have engaged a suitably qualified independent investigator and should have done so. As

the Employment Court in *Clark v Idea Services Ltd* and other identified cases counsel brought to my attention, found when considering a manager being an investigator and decision-maker - a fair and reasonable employer even when no protest was raised, would not have permitted someone who was so conflicted to occupy both roles.²

[171] While the above assessment cumulatively means I have found Port Otago did not act as a fair and reasonable employer could have done in all the circumstances, I do make the additional observation on a substantive basis, that the conclusion of serious misconduct on the basis that Captain O’Neal misled his employer is not sustained on the evidence I heard. It was an understandable assumption but it led to a misguided conclusion and it was made following what I have found to be flawed and incomplete investigation.

[172] I further observe that Captain O’Neill’s actions in seeking support for raising concerns about the re-engagement of the Casual Pilot and his decision to consult his co-pilots for support was, in of itself, not objectively capable of being considered a legitimate ground for a finding of misconduct serious or otherwise. I note the pilots who gave evidence did broadly share those concerns and the re-engagement of the Casual Pilot was not handled well. However, the casting of doubt by Captain O’Neill on the Casual Pilot’s obvious capability and the derogatory comments made about him was unprofessional and is a matter I will consider in assessing remedies.

[173] I do consider that Port Otago was acting without any malice in raising legitimate concerns about how Captain O’Neill approached his concerns and a disciplinary sanction short of dismissal would have been appropriate in all the circumstances.

[174] In addition, I conclude that Port Otago in objectively categorising Captain O’Neill’s conduct on the launch as intimidating was correct but I do not consider the launch incident reached the threshold of bullying or serious misconduct warranting a summary dismissal. Port Otago witnesses implicitly agreed with this view by Captain Bolt emphasising that but for his concern about being misled, he would not have dismissed Captain O’Neill. Combined with the letter it was close to being reasonable grounds for a dismissal but warranted a sanction short of that, where

² *Clark v Idea Services Ltd* [2013] NZEmpC 155.

Captain O'Neill could have been apprised of his employer's ongoing expectations that he would treat the Casual Pilot with professional respect and dignity and that any further conduct of such a nature may have led to his dismissal.

[175] While Mr Winders did not conclude the health and safety investigation's disciplinary component, he indicated a final warning was the likely outcome and this (a view that I find had some validity) is also a factor I will consider in assessing remedies.

Finding on the suspension

[176] I find the paid suspension was consensual and nothing untoward in the length of such. It allowed Captain O'Neill several opportunities to be heard and ample time to respond to the allegations at issue. It was not an action that caused Captain O'Neill to suffer determent.

[177] Given I have found that Captain O'Neill was unjustifiably dismissed he is entitled to consideration of other remedies he has claimed.

Should Captain O'Neill be reinstated?

[178] Captain O'Neill first identified his claim for reinstatement in his counsel's personal grievance letter of 20 September 2021. At this time, I understand that the position he formerly occupied remains unfilled.

[179] The reinstatement claim is made pursuant to s 123(1)(a) of the Act. Section 125 of the Act details reinstatement is the primary remedy and subs (2) indicates:

If this section applies, the Authority or court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[180] The Employment Court in *Christieson v Fonterra Co-operative Group Ltd* drew a distinction between practicable and reasonable as:

Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not

only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.³

[181] The onus of proving that it is not reasonable and practicable to reinstate rests with the employer.⁴

[182] While Captain Bolt is no longer employed at Port Otago, Mr Winders the current CEO, pointed to a belief based on his involvement in the health and safety investigation and oversight of the disciplinary investigation, that the requisite trust and confidence he was entitled to place in Captain O'Neill had been irrevocably eroded and it would be too disruptive to reinstate him. Mr Winders and Captain Bolt in giving evidence, cited Captain O'Neill's lack of remorse and insight into the manner he raised his complaint against the Casual Pilot and his downplaying of the findings of both the disciplinary and the health and safety investigation.

[183] While pilots work reasonably autonomously, Mr Winders was of the belief that Captain O'Neill if reinstated, would not desist in campaigning against the Casual Pilot who is currently still employed. Captain O'Neill's evidence before the Authority was highly critical of Port Otago's management decisions around safety issues and the Casual Pilot. Counsel for Port Otago cited concerns that Captain O'Neill may, if reinstated, refuse to follow management directives or engage in disruptive challenging of management decisions he disagrees with.

[184] Of practical concern was the likelihood, even though pilot's role was largely autonomous, of continued negative interactions with the Casual Pilot and potential further attempts to remove him as an assessor.

[185] In contrast, counsel for Captain O'Neill first observed that not reinstating Captain O'Neill would effectively end his career as a pilot in New Zealand and given his personal circumstances it may end his career altogether. There was some force in this submission. I also have regard to a comment made in his evidence that the experience of events has impinged upon Captain O'Neill's self-confidence that he described as "essential to the art of piloting" and whilst he said he could overcome this it is an issue of concern.

³ *Christieson v Fonterra Co-operative Group Limited* [2021] NZEmpC 142 at [39].

⁴ *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [7].

[186] Counsel for Captain O'Neill rightly concentrated on the concepts of practicability and reasonableness as separate concepts noting first that practicability means workable and that assessing reasonableness may require a broader view. On the latter, counsel contended that this was not a case where dismissal could credibly have been justified, but for the procedural deficiencies that I have identified. I do not share that view, as this was a case where various issues of concern were apparent and although I found the narrowness of the predominant focus of the decision to dismiss was unjustified (the wrong conclusion that the investigators had been misled), it was apparent that the overall employment relationship was in significant jeopardy.

[187] This is a case with some similarities to *Maddigan v Director General of Conservation* in terms of the degree of the breakdown in relationships where consideration of reinstatement followed a finding of a procedurally unfair dismissal and the court tried to balance up the interests of an employee with little career options beyond his conservation work and the employers' concerns about the practicality of restoring an objectively broken relationship.⁵

[188] One overall factor is Captain O'Neill exhibited a general lack of appreciation or recognition of his employer's basic management decision making rights on how they engaged and deployed staff.

[189] While reinstatement would be practicable and some factors undermine Port Otago's objections and Captain O'Neill is clearly a capable and well qualified senior pilot with support and personal regard from most of his colleagues for his fierce advocacy of safety issues, I am not objectively satisfied that it would be reasonable in all the circumstances to order reinstatement.

[190] I consider that the relationship is too broken which includes Captain O'Neill's obvious lack of trust in his former employer that involved a concern that they had an ulterior motive when dismissing him and that they went about this dismissal in a manner that caused him significant distress. Several factors that were raised before the Authority and the way they were advanced show that Captain O'Neill remains fixated on a dim view of his employer's actions on several fronts which would make reintegration a seriously difficult exercise.

⁵ *Maddigan v Director General of Conservation* [2019] NZEmpC.

[191] I decline to order reinstatement but I make the following finding on other available remedies.

Lost earnings

[192] Captain O'Neill gave evidence that his attempts to mitigate his lost earnings were constricted by being unable to find a comparable piloting position in Dunedin and his limiting family circumstances that prevented mobility and seagoing work involving absence from home. In addition, while working at Port Otago Captain O'Neill's Master's Foreign Going qualification lapsed and he indicated an extensive and expensive validation is required to renew it but he had latterly enrolled in a course to pursue this and had undertaken training as a launch master for casual work purposes. Captain O'Neill summarised his specialist skills and age did not assist in him finding shore-based work and he has been keeping himself busy with voluntary work. Captain O'Neill indicated that he had not planned to retire for a few years as he was in good physical health and had a household to support.

[193] Pursuant to s 123(1)(b) and s 128 of the Act, I consider in all the circumstances, exercising discretion under s 128(3) of the Act, that an award of lost remuneration under s 128(3) of the Act of more than three months is appropriate. Captain O'Neill sought full lost earnings up to the date of the Authority investigation meeting as a starting point (approximately 18 months) and cited cases in support of this approach.

[194] I was also assisted by an Employment Court decision of Judge Smith, *Roach v Nazareth Care Charitable Trust Board* that extensively traversed applicable case law in applying s 123 and s 128 of the Act.⁶

[195] I am obliged to balance matters up such as the potential that had Captain O'Neill not been dismissed, he would likely have been placed on a final warning due to a combination of the disciplinary and health and safety investigations and may have struggled to meet Port Otago's expectations of conduct expected of him. In addition, I must consider factors such as Captain O'Neill's age and the likelihood of him wanting to continue in his very demanding and responsible position.

⁶ *Roach v Nazareth Care Charitable Trust Board* [2108] ERNZ at [68] – [80].

[196] I consider it to be equitable in the circumstances to award Captain O’Neill nine months’ lost remuneration

Compensation for hurt and Humiliation

[197] Captain O’Neill gave evidence of the humiliation the actual dismissal caused after what was to him a lengthy and distressing disciplinary investigation that effectively ended his long piloting career – a career he clearly committed a significant amount of time and passion to. The fact that Captain O’Neill was devastated by his dismissal was acknowledged by Captain Bolt and co-pilots attested to the impact on him personally.

[198] From the evidence, apart from a deep and lingering sense of injustice, Captain O’Neill did not detail significant ongoing symptoms of distress and it appears that he has put in place mechanisms to keep busy and stoically cope with his distress, but he described for months after being dismissed he could not look at Otago harbour.

[199] I find that the impact of dismissal was reasonably significant and Port Otago had several opportunities during the disciplinary process to step back and assess the fairness of their investigative approach but chose to not do so, did not get legal advice, and allowed an issue that could have been resolved at an early stage, to escalate.

[200] Considering the evidence proffered and awards made by the Authority and the Employment Court and surveying cases brought to my attention in submissions, I award Captain O’Neill’s compensation of \$25,000 under s 123(1)(c)(i) of the Act.⁷

Interest

[201] Section 123(1)(b) of the Act allows the Authority to consider reimbursing “other money lost” by the employee flowing from a grievance and interest plainly falls under this category of remedy. I find that interest as claimed should be paid only on lost wages awarded and not the compensatory award (an approach adopted by Chief Judge Inglis in *Nath v Advance International Cleaning Systems (NZ) Ltd*)⁸.

⁷ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

⁸ *Nath v Advance International Cleaning Systems (NZ) Ltd* [2017] NZEmpC 101 at [112] – [114].

Contribution

[202] Section 124 of the Act states that I must assess the extent to what, if any, Captain O’Neill’s actions contributed to the situation that gave rise to his personal grievance and then assess whether the calculated remedy should be reduced. I have considered the relevant factors well summarised by the Employment Court in *Maddigan v Director General of Conservation*⁹ that I have discussed above as a case having some parallels with Captain O’Neill’s situation.

[203] In the circumstances, I find that Captain O’Neill’s initial approach to the Casual Pilot and the tone and content of his letter to Captain Boat unnecessarily disparaging of the Casual Pilot and his attempt to downplay his interactions during the launch incident significantly contributed to the circumstances leading up to his personal grievance and the prolonged disciplinary investigation. Captain O’Neill’s objectively unreasonable stance, in challenging management’s prerogative in re-engaging the Casual Pilot and deploying him on assessment duties was also a contributing factor as was the tone and content of his communication with co-pilots. Whilst I do not endorse suggestions that it was somehow inappropriate that Captain O’Neill sought a collective approach to safety issues, how he pursued such was at times divisive amongst his colleagues who ironically largely supported his advocacy on their behalf.

[204] The evidence also showed that Captain O’Neill was not contrite at the time his unacceptable behaviour was brought to his attention and he continued to challenge Captain Bolt by his letter point blank refusing to work with the Casual Pilot and Port Otago investigators to justify his actions in the face of Port Otago having legitimate concerns about his approach to relationships and other issues they identified.

[205] In such circumstances, I find Mr O’Neill, significantly contributed to the circumstances giving rise to his personal grievance and reduce by 25% the \$25,000 compensatory amount I have assessed under s 123(1)(c)(i).

⁹ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Summary of orders

[206] I have found that:

- (a) Captain Hugh O’Neill was unjustifiably dismissed.
- (b) Port Otago Limited must within 28 days of this determination being issued, pay: Captain Hugh O’Neill the sum of \$17,500 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000; and:
- (c) Lost remuneration of nine months pursuant to s 123(1)(c)(ii) Employment Relations Act 2000. The quantification of such is to be determined by agreement between the parties with leave reserved to return to the Authority within 28 days of this determination being issued should agreement not be reached.
- (d) Interest is to be paid on the full lost wages figure above once quantified in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Costs

[207] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, the party seeking costs has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be determined outside this timetable unless prior leave is sought and granted by the Authority.

[208] The parties should expect the Authority to determine costs on its usual “daily tariff” basis unless specific circumstances or factors, require an adjustment upward or downward.¹⁰

David G Beck
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1