

Contemporaneously with his employment by Eastland, Captain Mitchell was also engaged by the Gisborne District Council as its Harbourmaster.

[3] On 11 May 2010, Captain Mitchell received a letter from Eastland suspending him on full pay to enable an investigation to take place into allegations that he had defaced company documents with offensive observations and not followed procedure in relation to work-related accidents. Bound up in those allegations just referred to was an underlying and more serious allegation that Captain Mitchell had bullied a co-worker and the justification for the suspension was allegedly to protect co-workers from “*retribution*” by Captain Mitchell.

[4] There was further correspondence from Eastland on 12 May 2010 which identified that the bullying allegation and the defacing document allegation both related to an incident on 10 May 2010 whereas the allegation of failure to follow the company’s processes in relation to work-related accidents dated back to 20 March 2010.

[5] There was a disciplinary meeting on 20 May 2010 after which Captain Mitchell was advised that Eastland was considering terminating his employment.

[6] A second disciplinary meeting took place on 27 May 2010 as a consequence of which Captain Mitchell was dismissed from his employment. A letter of dismissal dated the same day followed.

Issues

[7] It will be convenient if the Authority considers each of the separate bases on which Eastland relied to dismiss Captain Mitchell from his employment. On that basis then, the Authority should consider the following questions:

- (a) Did Captain Mitchell deface company documents;
- (b) Did Captain Mitchell bully anyone;
- (c) Did Captain Mitchell fail to follow company procedures for a work accident?

Did Captain Mitchell deface company documents?

[8] On Sunday, 9 May 2010, the cargo vessel *Sea Sparkle* was due to depart Port Gisborne at 0700 hours. Captain Charlie Jamieson, an Eastland pilot reporting to Captain Mitchell, was the designated pilot for the outward bound transit of the vessel.

[9] In accordance with usual practice, Captain Jamieson prepared a Passage Plan for the sailing of the vessel. Captain Jamieson's usual practice was to prepare the Passage Plan in advance, insofar as that was possible. Because the sail time was early on a Sunday morning, he attended to the basic details of the task of drafting the Passage Plan on the previous Friday afternoon. Captain Jamieson left the partially completed document in the office so that when he came in first thing on Sunday morning to undertake the pilotage duty, he had only to complete the information that could only be recorded that day. This particularly related to the "*tidal windows*" which were relevant for the purposes of moving vessels. In addition, first thing on Sunday morning, Captain Jamieson would print off the weather forecast and the weather forecast together with the Passage Plan would be made available to the master of the outgoing vessel as part of the pilot's professional obligations.

[10] After he had gone home on Friday evening, a co-worker, Mr Dean Craw, observed Captain Mitchell writing on Captain Jamieson's Passage Plan and allegedly muttering something like "*I'll teach this bastard a lesson*". Mr Craw says that Captain Mitchell then picked up the Passage Plan (which had been sitting on the pilot's desk in the open office), and said to him something to the effect that Captain Jamieson was setting him up or fucking with him. Captain Mitchell then left the office and Mr Craw was able to read what Captain Mitchell had written on Captain Jamieson's Passage Plan. He told the Authority "*I didn't like what I saw*". Mr Craw rang Captain Jamieson at home. He told Captain Jamieson to check the Passage Plan before he took the ship out.

[11] Captain Jamieson checked the Passage Plan prior to the sailing and found that Captain Mitchell had written on it "*I must be kind to my boss and not set fuckwit safety walla's on him when I know its wrong*". Captain Jamieson formed the view that Captain Mitchell was trying to "*make me look like a fool in front of the vessel's master*". This is because Captain Jamieson thought that, in the ordinary course of events, he would not have checked the Passage Plan before boarding the vessel to take her to sea, and the annotation by Captain Mitchell would only have been discovered

when he (Captain Jamieson) was doing the master/pilot exchange on board the vessel. During that exchange, the pilot would give to the master the latest weather forecast and the Passage Plan which he had previously prepared.

[12] Because he had been forewarned by Mr Crow about the annotation, Captain Jamieson was able to redraft the Passage Plan in its entirety so as not to cause him or Eastland any embarrassment. Captain Jamieson told the Authority that the master of the *Sea Sparkle* was Chinese and, in his experience, Chinese masters were:

... very fastidious with paperwork and they take a dim view of untidy plans. In my experience they would not have been impressed with such a note on a Passage Plan. The master would not have accepted this defaced document as they know it is an auditable document and the first document the port/state inspector wants to see if there is an incident.

Further, I do not carry spare Passage Plans on me when I go out to the vessels. So rejection of the plan by the master would have meant delayed departure so I could go back and draw up another Passage Plan adjusting all the sequences to reflect the time, tidal and weather changes. Then I would have to go back out to the vessel and do the whole master/pilot exchange all over again.

The delay has flow on effects down the chain for the vessel and our operations. It also makes us look unprofessional. It reflects badly on me professionally and Eastland as my employer.

[13] Captain Mitchell accepts that he wrote the message on the Passage Plan. The observations in it relate, according to Captain Mitchell, to his colleague Captain Jamieson allegedly reporting Captain Mitchell to the health and safety officer for Eastland because of an earlier accident that Captain Mitchell had been involved in. Captain Mitchell justified the inclusion of the offending words on the basis that Captain Jamieson was

... a longstanding maritime friend of mine” and that “it just seemed funny at the time. ... the comment was written on the Passage Plan with the intention of having a laugh with Charlie [Captain Jamieson]. it was never done with the intention of defacing a company document ... I knew he [Captain Jamieson] would see my comment for what it was – a practical joke. I knew it could never slip past him and never considered for one minute that he would have taken it on board the ship with him. I also never considered he would take exception to the joke either.

[14] In the disciplinary inquiry that followed, Captain Mitchell acknowledged that his behaviour was unsatisfactory and that he should not have done what he did and he

told the Authority in his brief of evidence that “*I totally misjudged what Charlie’s reaction was going to be*”.

[15] Clearly then, the incident has a context. If this had been a single event entirely without context, then arguably it would have been explicable on the basis suggested by Captain Mitchell and could well have been passed off by Eastland as, at worst, a joke that nobody else thought was funny. But there was a context and the fact that Captain Mitchell did not understand that context (and on the evidence the Authority heard, appears to have been the only person at Eastland who did not understand that context), is, to a very real extent, the central core of this employment relationship problem.

Was Captain Mitchell a bully?

[16] The Authority has little doubt that the evidence presented to it discloses that Captain Mitchell did bully his colleagues, particularly his immediate reports which included, initially, Mr Craw Mr Burgess and Captain Jamieson. The extent to which those former colleagues have been traumatised by Captain Mitchell’s behaviour is quite extraordinary. For instance, Captain Jamieson made it clear in his evidence to the Authority that he had “*no desire to read (Captain Mitchell’s statement)*” although he acknowledged that Captain Mitchell wrote about him in it, and notwithstanding that it was relevant to the proceeding for him to do so. Captain Jamieson apologised to the Authority for his unwillingness to do this but said that “*I want to put this all behind me*”. In a like vein, Mr Craw described Captain Mitchell as “*a destructive influence on all those working with him and particularly under him*” and said that Captain Mitchell was “*a bully*”. Mr Burgess gave similar evidence.

[17] Of course, the fact that colleagues say that a co-worker is a bully does not make him so, but sadly in the present case, there is a long history of behaviour which suggests to the Authority that the characterisation of Captain Mitchell as a bully vis-a-vis his immediate subordinates in this workplace, is made out.

[18] Captain Mitchell and Captain Jamieson had had a long working relationship. By common consent, they had known each other for 25 years and served together on a number of seagoing vessels as deck officers. They were, at one point, friends. Ironically, while they were at sea, Captain Jamieson was ahead of Captain Mitchell

and on one vessel they served on, Captain Jamieson was master and Captain Mitchell was mate (that is, chief officer or second in command).

[19] Captain Jamieson's evidence is that, after Captain Mitchell came ashore, the pair were not in contact for some years and that they had not spoken to each other for six or seven years before Captain Jamieson received a telephone call from Captain Mitchell in which the latter offered Captain Jamieson a job as Marine Supervisor at Gisborne with the opportunity of subsequently getting his pilotage licence for the port at Gisborne.

[20] Captain Jamieson looked at the opportunity and decided that it would work for him. He thought he had a good relationship with Captain Mitchell because he knew that Captain Mitchell would be doing his training. Given their previous association, Captain Jamieson had no concerns in this regard and thought living in Gisborne would be an attractive environment for he and his family.

[21] But once the training for his upcoming pilotage responsibilities started, Captain Jamieson saw:

... a whole new side to [Captain] Mitchell that I had never seen before. It was a nightmare. He was into grandstanding and told me on a number of occasions that he knew how to handle people and knew the right buttons to push.

[22] Captain Jamieson gave the Authority evidence that Captain Mitchell had, from time to time, made veiled threats that he was going to sack him and, by all accounts, the pilotage training for Captain Jamieson took inordinately longer than it ought to have. Captain Jamieson said this was because Captain Mitchell was being manipulative and difficult and refusing to sign off on progress as it was made. Captain Mitchell says in his evidence that Captain Jamieson was simply not up to the task. Captain Jamieson's evidence is that he was effectively caught because he had sold up, purchased a home in Gisborne and moved his family there, and there were few other opportunities (if any) for his particular professional expertise in Gisborne itself. He felt he had to persevere. The personal relationship between the two men deteriorated steadily and Captain Jamieson records in his evidence that, by about six months into his training, he felt he had lost respect for Captain Mitchell.

[23] There were other dramatic changes to Captain Jamieson's circumstances as well. The strain of getting the pilotage qualification and generally working with

Captain Mitchell took its toll on Captain Jamieson's family life and he attributes the separation of he and his wife at that point as a function of the tension that he had in the workplace and which he was bringing home.

[24] There was an altercation between the two men in January of 2008, about two years into Captain Jamieson's employment at Eastland, during which Captain Jamieson allegedly had a reasonably public outburst at Captain Mitchell. Subsequently, Captain Jamieson complained to Eastland about Captain Mitchell. It is common ground that what Captain Jamieson said was that Captain Mitchell was manipulating and controlling his training and deliberately holding him back. Specifically, both Captain Jamieson and Eastland acknowledge that Captain Jamieson used the word "*bully*" to describe Captain Mitchell. The discussion which Captain Jamieson had initiated with Eastland was with Andrew Gaddum who was a General Manager at Eastland.

[25] Mr Gaddum acknowledged to the Authority that he took no steps about that report at the time. He raised it generally some months later in his performance assessment of Captain Mitchell although the latter described the reference as a *general whinge* rather than a specific allegation of bullying. Mr Gaddum blamed his own inexperience in a general management role and Captain Mitchell's position of power as the only pilot to operate the port for not taking a firmer line. It will be readily understood that, in order for a commercial port to operate, it must, of necessity, be able to offer harbour pilots to assist vessels to transit in and out of the port, if it is to remain a viable commercial entity. Typically foreign-going vessels will all require a pilot to enter or depart a port and only a relatively small number of coastal vessels would have masters aboard with a pilotage exemption certificate which would preclude the necessity to take a pilot.

[26] Captain Mitchell says that the reason it took so long for Captain Jamieson to become an unlimited licensed pilot for the port was because of Captain Jamieson's "*competency issues*". The period of time involved was over three years. Observers of the process (colleagues not professionally involved) such as Mr Craw, believed that Captain Mitchell was deliberately making it difficult for Captain Jamieson to get his licence. Mr Craw made these observations to the Authority:

I knew that Rob [Captain Mitchell] was making it difficult for Charlie Jamieson [Captain Jamieson] to get his pilot's licence. ... He was requiring Charlie to do many more transits than necessary saying

they were not up to the standard he required. ... Rob seemed simply to be getting off on his ability to wield power over Charlie.

[27] Eventually, with the assistance of a contract pilot from outside of the Poverty Bay area, Captain Jamieson became qualified but his evidence is that that did not improve the relationship with Captain Mitchell and that view of matters is shared by Mr Craw and by Mr Gaddum, both of whom maintain that the bullying continued but simply on a different basis. One testament to the continuing difficulties in the workplace was Mr Craw's request of Mr Gaddum to be removed from under the direct control of Captain Mitchell which Mr Gaddum agreed to. This happened during Mr Craw's staff review in March 2010 and from about that date onwards, Mr Craw ceased to report to Captain Mitchell.

[28] Mr Gaddum told the Authority that he would like to have removed Captain Jamieson from direct reporting to Captain Mitchell as well, but that was practically impossible because of the nature of their professional relationship and the unique skills which the two men possessed. At the same time, Mr Neil Burgess, now a contract engineer for Eastland, previously reported to Captain Mitchell and, like Mr Craw, sought to be removed from direct relationship with Captain Mitchell. Mr Burgess said that Captain Mitchell's approach:

... was to frequently verbally bully his reports. To put people down was his forte. He was divisive, would turn one against the other. He seemed to enjoy conflict amongst his reports. My office was during such events not a nice place to be.

[29] By way of a concession to Captain Jamieson and to highlight the seriousness with which Eastland took the allegations of bullying behaviour by Captain Mitchell, Mr Gaddum undertook Captain Jamieson's performance reviews from 2010 instead of having them done by Captain Mitchell.

[30] In any event, once he completed his training, Captain Jamieson continued to experience bullying by Captain Mitchell and indeed he says that things "*only got worse when I got my licence. [Captain] Mitchell now with more direct control began to undermine and override my piloting decisions*". Counselling was provided for Captain Jamieson by Eastland but Mr Gaddum, who like Captain Jamieson, impressed the Authority as a straightforward and honourable man, indicated that Captain Jamieson was effectively worn down by the constant attacks from Captain Mitchell. There are various places in his evidence in which he describes Captain

Jamieson in admiring terms. An example is Mr Gaddum's description of Captain Jamieson as "*a very staunch seaman and to see him reduced to the state he was in was profound*".

[31] Clearly then, it is fair to summarise that at the beginning of 2010, Captain Jamieson said that he was experiencing bullying from his direct superior, had complained about that to the employer Eastland, and it had taken steps to ameliorate that so far as it felt able, principally by providing some buffer for Captain Jamieson by way of performance appraisals being done by Mr Gaddum and by providing some additional skills for Captain Jamieson to cope with the unpleasant atmosphere. In this category, the Authority puts the counselling that was provided to Captain Jamieson and a course on dealing with "difficult people" which Captain Jamieson was sent on by Eastland.

[32] Not only was Eastland convinced that Captain Jamieson was indeed being bullied but his immediate colleagues also thought he was being bullied and they thought they were being bullied too. Both Mr Burgess and Mr Craw approached Mr Gaddum and sought to be distanced from Captain Mitchell and that was attended to. Both Mr Burgess and Mr Craw gave straightforward and plain evidence to the Authority that they regarded Captain Mitchell as a bully and were pleased when he left the workplace. Both men impressed the Authority with their evidence, notwithstanding that Captain Mitchell was of course present when they gave that evidence.

[33] The definition of workplace bullying might be characterised as a form of personal or supervisory/managerial harassment, which is characterised by repeated and persistent, offensive, abusive, intimidating, malicious or insulting behaviour such that the recipient suffers detrimental effects to their feeling of safety, wellbeing and general enjoyment of the work environment.

[34] On the basis of that definition, it is difficult to see how Captain Mitchell's behaviour could be described in any alternative way. First, Captain Mitchell is in a position of power over Captain Jamieson (and others) by reason of being their supervisor or manager. Second, Captain Mitchell has, on the evidence, committed repeated acts against those subordinates which they have variously described as intimidating, insulting or simply as bullying, and third, the evidence graphically

demonstrates that the effect of Captain Mitchell's behaviour was to undermine the recipients' feelings of self-worth and enjoyment of the workplace.

[35] The presence of those three elements and the plentiful evidence of each from a variety of sources satisfies the Authority that this is indeed an example of a bullying culture. The fact that Eastland accepted that Captain Mitchell was bullying his subordinates is also a relevant factor which the Authority must take into account, but it is not a determinative factor of itself. Certainly though, the fact that Eastland thought staff were being bullied and clearly tried a variety of different techniques to deal with that situation, does support the Authority's own conclusion.

Did Captain Mitchell breach company policy concerning a work accident?

[36] Eastland has a health and safety manual which contains a Hazard Management Policy together with an Incident Management Policy. The collective effect of that group of documents is to require the reporting of all injury accidents within 24 hours of their occurrence.

[37] On 20 March 2010, Captain Mitchell was mounting the pilot ladder to board a vessel to pilot it into Port Gisborne. While climbing the ladder, Captain Mitchell injured his back. The 20th of March 2010 was a Saturday and the incident in question took place on the Saturday afternoon. Captain Mitchell, according to his evidence, reported the incident the following Tuesday whereas Eastland says it was not reported until the following Thursday, 24 March 2010. Nothing turns on which date is to be preferred; either reporting date is outside the terms of the requirement that an employee report an accident within 24 hours of it occurring. The obligation to make contact, as that process is defined in Eastland's policy, is to make contact with the employee's immediate manager. In this case, Captain Mitchell ought to have made contact with Mr Gaddum, but in commenting on his failure to do so, he also made it clear that he had little time for Mr Gaddum and that the latter was not usually available at weekends. However, as Mr Gaddum pointed out in his evidence to the Authority, Captain Mitchell could have left a message on his phone or sent him an email.

[38] In any event, once the notification had been received by Eastland, it immediately commissioned an inquiry into the incident. That was undertaken by the health and safety facilitator, Mr Handcock. Captain Mitchell's immediate response to

the notification of an investigation is to advise the CEO that he (Captain Mitchell) was “*the leader of the port’s health and safety system*” and impliedly indicated that no investigation was required.

[39] A very long investigation report finally issues in May 2010. The Authority observed during the course of the investigation meeting that the length of time it took Eastland to complete this report was too long and that reliance on it after the passage of so many weeks might well be inappropriate.

[40] In any event, the report finally issued and the two key findings were that Captain Mitchell had failed to fulfil his obligations under the Eastland health and safety policy and that his description of the event complained of might be unreliable. Critically, Captain Jamieson had helped Mr Handcock in the collection of information for the report particularly around the maritime aspects.

[41] Contemporaneously to the release of the Handcock report, Captain Mitchell raised allegations about Captain Jamieson’s pilotage of two vessels on 1 and 3 May 2010 and while those complaints were being considered (and subsequently rejected) by Eastland, the incident concerning the annotation of the Passage Plan occurred and a disciplinary inquiry was initiated which included all three aspects that have been commented on in this determination.

[42] Captain Mitchell said in his evidence to the Authority that he did not understand the company’s policy to require reporting within 24 hours, that by implication as the head of the port’s health and safety, he did not need to report to anyone, and that there were a variety of different versions of the health and safety manual for Eastland and not all of them required 24 hour reporting. In addition, Captain Mitchell also alleged that Mr Gaddum was difficult to get hold of at the weekend and he generally sought to minimise the event.

[43] However, what fed into the continuing poisonous relationship between Captains Mitchell and Jamieson was Captain Mitchell’s conclusion (erroneous as it happens) that Captain Jamieson had somehow “*put his weights up*” in the work that Captain Jamieson had done to assist Mr Handcock, the writer of the health and safety report. Of course, Captain Jamieson had done nothing of the sort. He had simply provided Mr Handcock with what amounted to local knowledge about the particular maritime aspects of the incident. Notwithstanding that, it was Captain Jamieson’s

alleged involvement in a negative way in this investigation which Captain Mitchell was commenting on in the annotation to the Passage Plan.

[44] Captain Mitchell also protests that, in addition to not understanding that he was required to report the incident within 24 hours, that it was a bit rich for Eastland to reach a conclusion that he was guilty of serious misconduct in failing to report something in a timely manner when its own report on the incident took months to issue. What is more, Captain Mitchell argues persuasively that the breach could at best be ordinary misconduct and not serious misconduct and therefore the possible sanction of dismissal would likely be off the table.

[45] In the Authority's opinion, if this were the only allegation that Captain Mitchell was facing, he would have successfully prosecuted his claim that he had been unjustifiably dismissed. But that is not the position here, as there were two other allegations on which Eastland relied and both of them are, in the Authority's opinion, sufficient of themselves to justify a finding of serious misconduct within the terms of Captain Mitchell's employment agreement which included the Eastland Infrastructure Code of Conduct. Pursuant to clause 3 of the employment agreement, Captain Mitchell was bound to accept not just the Code of Conduct but also any other reasonable policies and procedures set up by the employer, such as the health and safety policy.

Determination

[46] Captain Mitchell was dismissed from the service of Eastland on 27 May 2010. He was summarily dismissed after findings of serious misconduct were made against him with regard to findings of fault about the improper annotation of the Passage Plan, conduct which caused "*undue risk to another person*" and failure to follow the company's health and safety policy in respect of the obligation to report within 24 hours. Eastland found that Captain Mitchell had failed to perform his duties "*with the reasonable skill diligence and judgement expected of someone in such a senior position, especially with your significant health and safety responsibilities*".

[47] Under the employee Code of Conduct policy, serious misconduct is defined as "*behaviour which undermines the contractual relationship between employer and employee, and/or threatens the wellbeing of the organisation, its employees and clients*".

[48] The list of matters which might constitute serious misconduct includes:

- *Acts of violence against another person during working hours including using threatening language or intimidating behaviour*
- *Acts of disobedience, negligence or incompetence which affects safety, quality, security on company or client property or the good conduct of the business ...*
- *Failure to follow company or regulatory safety requirements, policies and procedures ...*

[49] The Authority has already made clear that if the only basis on which Captain Mitchell's position was in jeopardy was the breach of safety requirements by failure to notify within 24 hours, the Authority would have difficulty in concluding that the dismissal was a justified one. However, that was not the only basis on which Eastland found fault with Captain Mitchell's performance and indeed it would be more accurate to say that Captain Mitchell's failures in relation to the health and safety issue were more around how he behaved in responding to the report rather than his single failure to report within time.

[50] Indeed, from the Authority's perspective looking at the matter in the round, Captain Mitchell's response to the report and his dismissive conduct in relation to his immediate manager, Mr Gaddum, his apparent refusal to take health and safety issues seriously and his various attempts to minimise the significance or otherwise of the health and safety incident itself all demonstrate the judgement flaws which seem to underpin Eastland's conclusion to dismiss Captain Mitchell for cause.

[51] What is more, the Authority is absolutely satisfied that the basis of the dismissal, relying as it does on the two other heads of annotating of the Passage Plan and bullying of a colleague, is amply made out by the evidence. While the Authority might have preferred the employer to rely on the health and safety issue as illustrative of its wider anxieties about judgement rather than the narrow point about whether a report was filed in due time, looked at in the round, the Authority is satisfied that the decision that Eastland reached to dismiss Captain Mitchell was the decision that a fair and reasonable employer would reach in the particular circumstances of the case after the conducting of a proper and thorough inquiry into the matters complained of.

[52] It follows from the foregoing conclusion that Captain Mitchell's claim for unjustified dismissal fails and Eastland is successful in satisfying the Authority that

the dismissal of Captain Mitchell was, in all the circumstances that existed at that time, a justified one.

[53] Eastland seek an order for the breach of s 148 of the Employment Relations Act 2000, to satisfy their allegation that Captain Mitchell has breached the confidentiality aspects of the mediation process. On the face of it, Captain Mitchell has breached that section. The Authority was advised of matters in Captain Mitchell's closing submissions which it has no right to know. The remedy is discretionary however and given the fact that Captain Mitchell is not a professional advocate, it is a remedy that the Authority declines to award. However, Captain Mitchell would have been told about the confidentiality requirements, and on that basis, he ought to know better than to breach them.

[54] Eastland also seek an order requiring the return of company property. The order relates to material on Captain Mitchell's personal computer. Eastland seek its return and an undertaking the material is not copied now nor will it be. The practical reality may be that Captain Mitchell should simply confirm that the material has been destroyed and that no copies have been retained, now that the employment relationship has come to an end. The Authority so orders.

Costs

[55] Costs are reserved.

James Crichton
Member of the Employment Relations Authority