IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 191
EMPC 446/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MURRAY APPLETON Plaintiff
AND	TASMAN CARGO AIRLINES PTY LIMITED Defendant

Hearing:	23 May–26 May 2023 29 May–30 May 2023 (Heard at Auckland)
Appearances:	F Pilditch KC and J Hall, counsel for plaintiff K Dunn, counsel for defendant (via AVL) K Creagh, counsel for defendant
Judgment:	3 November 2023

JUDGMENT OF JUDGE J C HOLDEN

---

[1] Murray Appleton was employed by Tasman Cargo Airlines PTY Ltd (Tasman Cargo) as a captain from 2012 until his dismissal on 6 April 2020. Mr Appleton was dismissed for serious misconduct after Tasman Cargo concluded that he had failed to conduct a compliant pre-flight inspection before a flight on 10 December 2019.

[2] The Employment Relations Authority found that Mr Appleton's dismissal was justifiable but that he had been unjustifiably disadvantaged in relation to the preceding suspension.[1]

[3] Mr Appleton has challenged the Authority's determination. He continues to maintain he was unjustifiably dismissed. He also claims he has been unjustifiably disadvantaged by Tasman Cargo, in that it:

(a) failed to follow its own procedures (and thereby breached the employment agreement); and

(b) behaved in a misleading manner, or a manner likely to mislead.

[4] In his statement of claim, Mr Appleton seeks reinstatement together with lost wages, $30,000 compensation for humiliation, loss of dignity and injury to his feelings, and interest calculated in accordance with sch 2 to the Interest on Money Claims Act 2016.[2]

[5] He also seeks an order requiring Tasman Cargo to correct any errors or incorrect statements in its records concerning him, including his training records (as written by Tasman Cargo) and to make those corrections known to the Civil Aviation Safety Authority of Australia (CASA).

The events arose in the context of the aviation industry

[6] Mr Appleton says that the context of the aviation industry is central to his employment relationship problem.

[7] Although Tasman Cargo has a base in New Zealand, at all relevant times it operated under an Australian Air Operator's Certificate and was therefore subject to Australian law and regulations.

---

1 *Appleton v Tasman Cargo Airlines PTY Ltd* [2021] NZERA 507 (Member Urlich).

2 In closing submissions, counsel for Mr Appleton also referred to employer contributions that were deducted from Mr Appleton's superannuation but the claim was not amended and only limited evidence on the point was given.

[8] As Tasman Cargo operated a freight service,[3] it was engaged in commercial operations that required authorisation in the form of an Air Operator's Certificate from CASA.

[9] In order to obtain that Air Operator's Certificate, Tasman Cargo had to produce Standard Operating Procedures (SOPs) covering its operation that were satisfactory to CASA. Its SOPs included the Policy and Procedures Manual (PPM) and the Flight Crew Operations Manual (made by Boeing, as the manufacturer of the 767 aircraft) (FCOM).

[10] Parts of those manuals that Mr Appleton says are relevant to this case include in relation to:

(a) the nature and type of aircraft operations that Tasman Cargo was conducting and the pre-flight checks for those operations;

(b) training and checking;

(c) Tasman Cargo's policies and procedures relating to safety investigations;

(d) "Just Culture"; and

(e) ground operations.

[11] Just Culture exists generally within the airline industry and was adopted by Tasman Cargo. The intent of Just Culture is to foster an environment of mutual trust aimed at safety and improvement. The approach can be contrasted with one focussed on blame and punishment. Under the Just Culture model, people are encouraged to provide essential safety-related information, and are supported to learn from unsafe acts to improve the level of safety awareness through the improved recognition of safety situations. It is intended to help develop conscious articulation and sharing of

---

3 Under the DHL brand.

safety information. On its website, Tasman Cargo confirms that it operates, or strives to operate, a Just Culture.

[12] Just Culture applies in safety investigations, including where they are initiated by the employer. It means that where a person makes an error, that leads to coaching and training, rather than in disciplinary action. It does not, however, protect wilful or reckless misconduct, or conduct that is malicious or done in bad faith. Where there is a history of repetitive errors or at-risk behaviours, that too can lead to disciplinary action.

[13] Flights are either extended diversion time operations (EDTO) or non-EDTO flights. An EDTO flight is one where the plane may be more than 60 minutes away from an alternative airfield. Trans-Tasman flights would be EDTO flights. Tasman Cargo, however, treats all flights as though they are EDTO flights so that the additional requirements for EDTO flights are required for non-EDTO flights as well. One of the requirements for an EDTO flight is a pre-flight inspection of the aircraft by an engineer.

[14] Tasman Cargo contends that there is also an obligation on the pilot in command of a flight to conduct a pre-flight inspection, and that this applies regardless of whether the flight is an EDTO or a non-EDTO flight. Mr Appleton does not agree with that, or in any event says that there are conflicts within the SOPs that mean that the position is not clear.

Mr Appleton was employed as a captain

[15] Mr Appleton started his employment with Tasman Cargo on 2 April 2012, as a captain. In that role, he was rostered to work two or three nights each week and would fly from Auckland to Sydney and back. As a captain, Mr Appleton was the pilot in command of the aircraft.

[16] Mr Appleton was employed under an individual employment agreement which contained the following relevant clauses:

(a) At clause 9.2:

> The employee shall at all times comply with all lawful orders and instructions given to him/her by the appropriate Company representatives. The employee shall comply in all respects with rules, conditions of employment and Company policy and procedures, which have been or may be established by [Tasman Cargo].

(b) At clause 5 of Schedule C:

> **Performance of Duties:**
> All lawful instructions given to an employee by an authorised representative of the Company are to be carried out promptly and efficiently. If anyone has good reason to object to any instructions, the person giving those instructions should be advised immediately in a polite and civil manner the reason for the objection. Failure to carry out instructions could result in disciplinary action including dismissal.
> …

(c) At clause 17 of Schedule C:

> …
>
> Any employee acting in an unsafe manner or breaching safety instructions or policy may be subject to disciplinary action.

(d) As set out in paragraph 1.13 in Part I of clause 22 in Schedule C, serious misconduct can include:

> Failure to obey a lawful and reasonable instruction or direction given by [Tasman Cargo].

Various employment issues arose

[17] In the course of his employment, Mr Appleton raised various issues where he considered there was conflict between the SOPs and the ongoing training he was getting from Tasman Cargo.

[18] Mr Appleton also reported a concern he had in relation to an event involving a fuel configuration alert to the Australian Transport Safety Bureau. This event arose

when Andrew Sturrock was the pilot in command of the aircraft in question. At all relevant times, Captain Sturrock was Tasman Cargo's head of flight operations. He is now Tasman Cargo's head of operational governance in New Zealand.

[19] On or about 5 September 2019, Mr Appleton was assessed for a line check by Stewart Whiteside, with another Captain acting as first officer. Captain Whiteside was then Tasman Cargo's head of training. At the conclusion of the line check, Captain Whiteside failed Mr Appleton principally because he had not used a torch during a night-time pre-flight inspection of the exterior of the aircraft.

[20] Mr Appleton was rostered for a further line check on 9 September 2019 but did not attend that line check. He and Captain Whiteside engaged in correspondence regarding the use of the torch and whether that was a requirement. Mr Appleton asked where there was any regulation or reference or requirement in Tasman Cargo's PPM or FCOM. Captain Whiteside responded:

> There is no regulation that says you must have a torch to conduct a preflight inspection. This does not provide a defence of your actions however. The requirement for you to be able to visually inspect the aircraft during your pre-flight is implied through the use of the word inspect or inspection. If at night you need to be able to ensure sufficient illumination exists by whatever means necessary.

[21] Captain Whiteside drew an analogy with using glasses for flying if a pilot's sight needs correction. The emails around this issue show some frustration on the part of Captain Whiteside; he clearly considered the need for a pilot to use their torch for a night-time inspection to be self-evident.

[22] The matter escalated to a meeting on 19 September 2019 involving Mr Appleton, his New Zealand Airline Pilots Association (NZALPA) representative, Captain Whiteside and a Tasman Cargo HR representative. At that meeting, Mr Appleton again questioned where the use of a torch when conducting an external inspection of an aircraft was prescribed. The discussion became quite heated after Mr Appleton challenged the form completed by Captain Whiteside. The loud volume and intensity of Captain Whiteside's responses caused the HR representative to interject in the discussion and the meeting ended up being shorter and less useful than hoped. While there is some dispute over what was covered at this meeting,

Tasman Cargo had an expectation coming out of the meeting that Mr Appleton would return to work to undergo a training flight and recheck.

[23] Training was then scheduled but did not occur. Mr Appleton was rechecked by Grant Rhind on 8 October 2019. Mr Rhind is an experienced Captain and was employed at Tasman Cargo at the time. On that date, Mr Appleton passed the line check. However, he received five "2" grades. None of the "2" grades were for the pre-flight check. While a "2" is a pass grade, it is the minimum standard. Accordingly, further training was arranged, and further line checks were to take place within three months. Captain Sturrock advised Mr Appleton that the training would allow Mr Rhind to provide the guidance that Mr Appleton may need in the areas of weakness shown on the line check.

[24] Mr Appleton had further training with Mr Rhind on a flight on 11 and 12 November 2019. Although Mr Appleton says he was advised that this flight would be a "training" flight conducted with Mr Rhind, he disputes that it was line training.

[25] This training was not documented at the time.

An issue arose with respect to a pre-flight inspection in December 2019

[26] The expectation of Tasman Cargo was that, when captaining a flight, Mr Appleton, as the pilot in command, would undertake a pre-flight inspection. This would involve a walkaround the aeroplane to various locations. A route is identified in the FCOM that covers the nose of the aeroplane, each wing and the tail. Although a route is depicted in the FCOM, it is accepted that the locations can be checked in any sequence. Essentially, the pre-flight inspection is intended to check that:

- the surfaces and structures are clear, not damaged, not missing parts and there are no fluid leaks
- the tires are not too worn, not damaged, and there is no tread separation
- the gear struts are not fully compressed
- the engine inlets and tailpipes are clear, the access panels are secured, the exterior is not damaged, and the reversers are stowed
- the doors and access panels that are not in use are latched

- the probes, vents, and static ports are clear and not damaged
- the skin area adjacent to the pilot probes and static ports is not wrinkled
- the antennas are not damaged
- the light lenses are clean and not damaged

[27] There was no initial concern about Mr Appleton's pre-flight inspection on 10 December 2019. There was, however, damage to the main cargo door of the aircraft at that time and CCTV footage was requested by Tasman Cargo and reviewed. It was during a review of the footage, that Tasman Cargo became concerned that Mr Appleton appeared to have completed an abbreviated pre-flight inspection of what was an EDTO flight, and that he did not inspect several key locations on the aircraft.

[28] On CASA being advised of this, it directed Tasman Cargo to investigate Mr Appleton's conduct on 10 December 2019. Shortly after this direction, on 10 January 2020, Mr Appleton was stood down from flying duties to allow for a safety investigation in relation to his conduct on 10 December 2019.

[29] On 14 January 2020, a safety investigation meeting was held. Mr Appleton attended with two NZALPA representatives. Tasman Cargo was represented by Ms Stanton, who was Tasman Cargo's Safety and Airline QA Manager. Captain Sturrock, who was Mr Appleton's line manager, was initially to attend the meeting but left after NZALPA objected to his attendance at what was a safety meeting.

[30] At the meeting, Mr Appleton asked Ms Stanton to provide any questions to him by email, so he could respond in writing. The exchange of questions and answers occurred over the next two days.

[31] Mr Appleton's answers cover what he understands are included in a normal external pre-flight inspection/walkaround. He said that the captain is required to do the first walkaround of the day and that the external pre-flight inspection/walkaround was "most definitely" an important function. His explanation for why he did an abbreviated walkaround on 10 December 2019 was that it was due to what he described as "the hostile unpredictable environment" caused by the freight activity on

the apron. Nevertheless, he expressed confidence that safety was not compromised in any way or that he missed anything on this occasion.

[32] In January 2020, after the investigation into the pre-flight inspection on 10 December 2019 had been commenced, there was an exchange of emails between Captain Whiteside and Mr Rhind. On 20 January 2020, Captain Whiteside asked Mr Rhind for training records for the flight on 11 and 12 November 2019:

> Can you please advise if you completed any paperwork for the line training flights with Murray before his line check? I can't recall if we did or not. Even if you can complete a log of training form would help. Tc03. In particular details of the walkaround inspection training.

[33] Mr Rhind was on leave but replied promptly, saying "I didn't fill any forms out sorry. I can put something together unsure if Murray need to sign it." This led to a response from Captain Whiteside:

> Thanks Grant, if you do a log of training form that is just the dates and times. If you also want to fill in a new daily training report for info as we did for [name] then that would normally be signed but that form was not officially in play then. If you wish, just send me an email that says the training as we discussed was completed. From my memory I think I just requested a complete external inspection walk through and discussions about PIC responsibilities. I will check my emails tomorrow. CASA have requested details of his training following a safety system audit. Andrew needs to send in the info in the next day or so.

[34] Mr Rhind replied to this email the following day, 21 January 2020:

> This email is to confirm training that was completed in 11 and 12 November 2019 for Murray Appleton.
>
> The training included discussion and observation regarding the responsibilities of the PIC before flight in accordance with CAR 233

[35] Following that, Captain Sturrock emailed Mr Rhind and Captain Whiteside:

> To close this loop correctly I need a Pilot Line Training Form TC-03 for those dates 11 and 12
>
> With comments on his performance and confirm Aircraft Preparation
>
> I have attached a copy of the form to be submitted.

[36] In the days following that email exchange, Mr Rhind completed a TC-03 Pilot Line Training Form, which includes the date of 11/12 September 2019, which was incorrect. That form records walkaround (external inspection) training on both days. The comment at the end of the form says:

> Training completed as result of line check failure. Emphasis placed on walkaround (and use of torch) & procedures (esp reading material on flight deck)
>
> Observed correct procedures.

[37] Ms Stanton prepared an investigation report, which was finalised on 30 January 2020 and provided to senior management at Tasman Cargo. The 11/12 September dates are picked up and referred to in the investigation report.

[38] The key findings in the investigation report were that Mr Appleton failed to conduct the walkaround in accordance with the SOPs and Tasman Cargo's policies and procedures. Ms Stanton found that Mr Appleton could not have seen everything he needed to see by taking the path he took. She found he failed to follow the FCOM procedures and failed to inspect the nose cone, wings, wing tips and tail. She said that the cause of Mr Appleton's failure was a perceived licence to bend rules.

The training records influenced the investigation report

[39] Mr Appleton placed importance on Mr Rhind's training record, pointing to the incorrect dates and the content of that record.

[40] Mr Appleton disputes that the training on 11 and 12 November 2019 had any focus on walkaround or external inspection training, which were not training needs arising from the 8 October 2019 line check. He notes that the request for the training form specifically identifies the need for details of walkaround inspection training and says that this taints the form that was subsequently produced.

[41] Mr Appleton did not know of the emails in January 2020 that led to the creation of the training record until the Authority hearing. Nevertheless, when he was presented with the document as part of the investigation, he asserted that it was a false document. He now says that not knowing it had been created so long after the event

deprived him of the opportunity to raise these matters when he responded to the allegations put to him in the safety investigation. He says this placed him at a serious disadvantage.

[42] Ms Stanton also confirmed in evidence that she was unaware that the training record had incorrect dates in it, or that it was created months after the training, until the Court hearing. She acknowledged that the sequence of failure, retraining, and rechecking that appeared from the records, and then what happened on 10 December 2019 was a significant driver of her findings and of her assessment as to causal factors; her belief that the training was in response to the failed line check was why it achieved the prominence in her report that it did. She confirmed she would not have relied on the record at all had she known the correct position.

A disciplinary procedure was undertaken leading to summary dismissal

[43] On 19 February 2020, Tasman Cargo advised Mr Appleton that it had concluded its investigation into the external flight inspection on 10 December 2019 and that it wished to meet with him to discuss the outcome of the investigation. The letter advised Mr Appleton that the issues raised were extremely serious and, should his explanation be unacceptable, it could result in disciplinary action being taken up to and including summary dismissal. Mr Appleton was sent a series of questions to which he responded on 24 February 2020; Tasman Cargo responded on 28 February 2020.

[44] On 5 March 2020, NZALPA wrote to Tasman Cargo on Mr Appleton's behalf submitting a personal grievance in relation to the way in which Tasman Cargo had carried out its safety investigation and then determined that a disciplinary investigation should be commenced. That letter disputed that Mr Appleton undertook further training on 11 and 12 September 2019 with a focus on walkarounds. Tasman Cargo responded by letter dated 9 March 2020, including that Mr Appleton received retraining on 11 November 2019 and that the reference to September on the form was incorrect and should read November.

[45] A preliminary meeting was held with Mr Appleton and his representatives on 20 March 2020. Tasman Cargo addressed the matters raised at that meeting in a letter dated 31 March 2020. That letter records that Tasman Cargo agreed with Mr Appleton that he did not need to conduct the inspection in the same order as set out in the SOPs, but said that he was required to physically go to each point on the checklist and that Mr Appleton accepted that he did not do so. The letter records Mr Appleton's explanation as being that he did not do so as he could see each component he needed to see from an alternative position. Tasman Cargo notes that it does not accept that this is correct and, in any event, is not what is required by the flight inspection as part of the SOPs. As Mr Appleton did not physically go to each location on the checklist, Tasman Cargo concluded that Mr Appleton failed to conduct a pre-flight external inspection of the aircraft in accordance with the SOPs, company procedures and the FCOM, a failure that Captain Sturrock described as "critical".

[46] Captain Sturrock recorded his preliminary view that summary dismissal was the appropriate outcome but invited a response by 5 pm on 2 April 2020.

[47] NZALPA responded on behalf of Mr Appleton on 2 April 2020. That letter records Mr Appleton's position that there has been confusion as to what, if any, direction has been made to do a walkaround in such a way as "to physically go to each point on the FCOM checklist". It says that they had previously raised concerns that the FCOM and the PPM have not been clear in what they have purported to instruct. It also raises concerns over training, the document trail used to support the decision, privacy in relation to the video evidence used and the provision of information. The letter does not dispute that a walkaround is required for all flights but questions what the walkaround should entail, specifically where the pilot is required to stand to inspect the points on the FCOM checklist. NZALPA notes that Mr Appleton has no objection to being given further clarity on what Tasman Cargo believes the points at which one should physically stand to carry out the inspection are and that he would carry out walkarounds in the future in line with that instruction. NZALPA says that Mr Appleton has indicated "if the Company's position was only made clear to him he would happily comply".

[48] Mr Appleton also disputes that the matters that were the subject of the allegations would justify a decision to terminate his employment. Lastly, NZALPA notes that the process being conducted by Tasman Cargo is impacting Mr Appleton's health and wellbeing, and asks that it turns its mind to that issue.

[49] The letter terminating Mr Appleton's employment is dated 6 April 2020. It concludes:

> I have considered the points in [NZALPA's] letter, and the totality of your response. I have, however, decided that termination of employment is the appropriate course of action in this situation. Health and safety is absolutely critical to our operations. Your failure to follow company instructions and directions in relation to the SOPs, company procedures and Boeing FCOM mean that I have lost trust and confidence in you and your ability to perform your role in a safe manner.

[50] The letter advises Mr Appleton that his employment was terminated with immediate effect and without notice being paid or worked.

Several issues arise

[51] From the evidence and submissions, several issues arise for consideration:

(a) What were Tasman Cargo's requirements for the pilot in charge in carrying out the external inspections?

(b) Was Mr Appleton aware of those requirements?

(c) Did he undertake those requirements on 10 December 2019?

(d) Was the investigation process fair?

(e) What is the impact of Just Culture?

(f) Was dismissal open to Tasman Cargo?

(g) If the dismissal was unjustifiable, what remedies should follow including:

(i) To what extent did Mr Appleton's actions contribute to this situation?[4]

(ii) Is reinstatement practicable and reasonable?[5]

(iii) What other remedies should be awarded to Mr Appleton?

(iv) Should any orders and/or recommendations be made regarding Tasman Cargo's records?

Tasman Cargo required pilots in charge to carry out pre-flight inspections

[52] Engineers had to carry out pre-flight inspections on EDTO flights. The issue that arose is whether a pilot in charge also needed to carry out such inspections.

[53] Part 7.8 of the PPM provides that the pilot in charge will complete the initial exterior pre-flight inspection in accordance with the FCOM at the beginning of the duty. The pilot in charge may delegate subsequent exterior inspections to another flight crew member. There is no distinction in part 7.8 between EDTO and non-EDTO flights. However, in part 13.11.2 of the PPM, which specifically deals with EDTO pre-flight inspections, it is provided that those inspections shall be carried out in accordance with the FCOM by a flight crew member prior to each flight. It also provides that engineering performs an EDTO certified pre-flight inspection before every EDTO planned sector.

[54] Under the heading "Exterior Inspection" in the FCOM it provides "Before each flight the captain, first officer, or maintenance crew must verify that the airplane is satisfactory for flight". It then describes the checking of the aircraft and sets out the inspection route map, which shows each point that the inspection must cover.

[55] For EDTO flights therefore, there are two inspections required. One is by the pilot in command or a suitable person to whom the pilot in command delegates the inspection, and the other by the engineer. The aircraft technical log demonstrates this,

---

4 Employment Relations Act 2000, s 124.
5 Section 125.

with different parts of the check to be signed off by different people. There are in total four signatures required on that form: a crew pre-flight signature, a captain acceptance signature, a captain post-flight signature, and the engineer certificate of release to service. There is a clear difference between a pilot inspection and that carried out by an engineer, with the engineer's inspection being more detailed, recognising the engineer's experience and expertise.

[56] My reading of the manuals is also consistent with the evidence given by the former technical director of NZALPA, who was called for Mr Appleton. He confirmed that a walkaround by a pilot could be part of the broader safety system. He referred to what is known as "Prof[essor] Reason's Swiss cheese model", being the model whereby there are a number of layers of "Swiss cheese" in the hope that each layer covers holes that may be present in a previous layer. He also accepted that the pilot pre-flight inspection would replicate items in the engineer's check, but said it would involve a separate inspection. From his observation of the CCTV footage, he accepted that Mr Appleton's walkaround on 10 December 2019 was an abbreviated inspection. He said that, if he had observed it as a trainer and flight examiner, he would question why the pilot did so and remind the pilot of the FCOM published procedure. If the pilot was under check, he would mark them down.

Mr Appleton was told of the requirement to do a pre-flight inspection

[57] As noted, Mr Appleton failed a line check in September 2019, in large part because he failed to use a torch on a night-time pre-flight inspection. What then followed was correspondence, principally in relation to where the requirement that a torch be used, is expressed.

[58] Mr Appleton, however, did raise the issue of whether, with the engineer having completed an EDTO check, any further inspections were in excess of the requirements as prescribed in the manual. Mr Appleton's position was, and continues to be, that where engineers have conducted an EDTO check, there is no need for the pilot in charge to also do a pre-flight inspection. His view is that the requirement for pre-flight inspections by the pilot in charge were limited to non-EDTO flights. In his evidence, Mr Appleton referred to the practice of his previous employers, which he says did not

require pilots to conduct pre-flight inspections where there had been an engineer sign-off for an EDTO flight. Notwithstanding Mr Appleton's view on the necessity for this, ultimately it was for Tasman Cargo and CASA to determine what was required in respect of Tasman Cargo's operations. Mr Appleton's view was in conflict with the PPM that draws no distinction between EDTO and non-EDTO flights, but requires an initial exterior pre-flight inspection in accordance with the FCOM. Mr Appleton dismissed the PPM requirement as a "throw away sentence".

[59] In any event, in an email following Mr Appleton's failed line check, Captain Whiteside expressly told Mr Appleton that failure to conduct an adequate pre-flight external inspection was not acceptable. Mr Appleton was advised that Tasman Cargo ground engineers were not trained to conduct flight crew pre-flight inspections, and that engineering inspections do not cover flight crew pre-flight responsibilities. He was advised this practice had never been approved within Tasman Cargo and that his training had never suggested that it was acceptable.

[60] Although Mr Appleton clearly considers that requiring the pilot in charge to conduct a EDTO pre-flight inspection is, in fact, unnecessary, given that the engineer will have to sign off on the certificate of release to service, it is hard to see how he was unaware in December 2019 that Tasman Cargo required him to do so.

[61] Further, as noted, in relation to the failed line check in September 2019, Mr Appleton claimed he was able to adequately see all points for an inspection without the need for a torch. Likewise, when it came to responding in respect of the 10 December 2019 pre-flight inspection, Mr Appleton argued that he was able to inspect all points from the vantage points he took during that inspection. This supports that Mr Appleton knew that a pre-flight inspection was required by Tasman Cargo.

[62] The conclusion that I have come to from hearing and reviewing the evidence, is that Mr Appleton considered Tasman Cargo's requirement that a pilot conduct a pre-flight inspection of an EDTO flight was overkill and unnecessary, given that an engineer had signed off on the certificate of release to service, but nonetheless that he was aware that Tasman Cargo required pilots to do so.

Mr Appleton did not undertake a full pre-flight inspection on 10 December 2019

[63] There is little dispute over what occurred on 10 December 2019 in respect of the pre-flight inspection. Mr Appleton accepts that he did not walk to all points set out in the FCOM. He explained that he did not do so because of what he said were health and safety issues arising because of ground crew activity around the aircraft. As noted, he also said he was able to adequately carry out the inspection from the vantage points he went to. He also again raised the issue of whether a pilot pre-flight inspection was required for an EDTO flight.

[64] The difficulty with respect to the health and safety issues is that Mr Appleton did not raise those issues at the time, but undertook the flight. It is hardly an excuse to identify that a safety procedure has not been able to be complied with but then to proceed with the flight.

The investigation process was flawed

[65] Mr Appleton disputed the flight training record for 11 and 12 November 2019 during the investigation. Notwithstanding that, he was not advised that the records had been prepared some months after the training had occurred. Had he been aware of that, and of the background requests to Mr Rhind for the records, he would have been in a better position to respond to the investigation.

[66] When looked at in sequence, the training in November 2019 was said to be to address the issues that arose in the 8 October 2019 line-check and led to the low marks. None of those low marks were with respect to pre-flight inspections, which lends credibility to Mr Appleton's position that the training that occurred on 11 and 12 November 2019 was not focussed on that issue.

[67] When Mr Rhind was requested to complete training records for that November training, he was specifically asked to provide details of the walkaround inspection training. The inference is that it was the reference to walkarounds in the emails that prompted Mr Rhind to prepare the training form influenced the content of that form.

[68] I agree with Mr Appleton that not being told the date the training record was created, even after he raised concerns over its veracity, disadvantaged him as he was deprived of the opportunity to have his concerns addressed in the safety investigation.

[69] Also, Ms Stanton who carried out the safety investigation, was not advised of the correct sequence of events, or that the training record had been completed on request sometime after the training had occurred. She acknowledged that if she had known these things, she would not have drawn the conclusion that she did.

[70] At this point it would be speculative to consider what conclusion she would have reached, and how that would have impacted on Tasman Cargo's later actions.

Just Culture impacts on the options that were available to Tasman Cargo

[71] After Tasman Cargo became aware of the abbreviated walkaround on 10 December 2019, it instituted a safety investigation. The disciplinary investigation followed the outcome of the safety investigation.

[72] It was common ground between the safety witnesses that Just Culture applied in the circumstance. This meant that, absent wilful or reckless misconduct or conduct that is malicious or done in bad faith or as part of a pattern of errors, disciplinary action will not follow a breach of safety.

[73] Because there was a flaw in the investigation process that now cannot be resolved, it is unclear whether disciplinary action could have been undertaken, that is, whether Mr Appleton's behaviour could be characterised as "reckless" or part of a pattern of errors. As a result, Captain Sturrock's decision to dismiss, being based upon the disciplinary investigation, also must be unsafe in the circumstances.

It follows that the procedure that led to Mr Appleton's dismissal unjustifiably disadvantaged him, and that the dismissal was unjustifiable

[74] The sequence of events leading to the conclusion of the safety investigator and the disciplinary process that flowed from that conclusion, means that the decision to dismiss Mr Appleton cannot be sustained as justifiable.

[75] The difficulty is more than procedural, it went to the substantive and critical finding of the safety investigator. While it would be speculative to determine now what might have been the outcome of the safety investigation had the investigator known the sequence of training and line checks, it is entirely possible that the behaviour would not have come within the categories of behaviour that would have justified a disciplinary process.

[76] The onus is on the employer to show that its conduct was justifiable, and Tasman Cargo has not satisfied that onus. I am not satisfied its actions were open to a fair and reasonable employer in all the circumstances; the procedure that led to Mr Appleton's dismissal unjustifiably disadvantaged him, and the dismissal was unjustifiable.

What remedies should be ordered

Mr Appleton contributed to the situation

[77] I have found that Mr Appleton knew what Tasman Cargo required of pilots on EDTO flights; he knew that a pre-flight inspection/walk-around was required. He knew what that entailed.

[78] On 10 December 2019 Mr Appleton conducted a truncated pre-flight inspection. He attempted to justify that by saying that he could see all points required to be inspected; that he was impeded in conducting a full pre-flight inspection because of the activities of the ground crew; and that a pilot pre-flight inspection of an EDTO flight is not actually required.

[79] The evidence of the former NZALPA technical director, and the Tasman Cargo witnesses, and the manuals to which I have referred, all confirm that a pre-flight inspection requires the pilot to attend each point on the map set out in the FCOM. Mr Appleton was required to attend to this on 10 December 2019 and did not do so. If he was impeded in carrying out the inspection because of activities of the ground crew, then those are matters that should have been addressed at the time; he could not simply fail to carry out an important safety check. His omission in that regard could be described as culpable or blameworthy.

[80] Tasman Cargo requires pilot pre-flight inspection of EDTO flights. Mr Appleton's attitude to that requirement was and remains unsatisfactory. What other airlines do is not the issue here, the issue is what was required by Tasman Cargo and communicated through its SOPs.

[81] Mr Appleton contributed to the situation that gave rise to his personal grievance. His contribution was significant, and as a result I find it must have an impact on both the nature and the extent of the remedies ordered.[6]

Reinstatement is not ordered

[82] Mr Appleton seeks reinstatement to his employment with Tasman Cargo. As part of that he also seeks that his records be amended to remove the disadvantage to his career caused by the presence of the 5 September 2019 line-check, the 11/12 November 2019 pilot line training form and the safety investigation report from his records. He notes that these documents are not merely Tasman Cargo documents, they are shared with CASA and as a result they form how CASA (and potentially future employers) perceive Mr Appleton's competence to fly.

[83] Reinstatement is the primary remedy so that if it is sought, and it is determined that the employee has a personal grievance, it must be provided for wherever practicable and reasonable.[7]

[84] To be practicable, reinstatement 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 done and carried out successfully.[8] In considering reasonableness, the Court will look at the prospective effects of an order, not only on the individual employer and employee in the case, but on other affected employees of the same employer. In some situations, the interests of third parties will also need to be considered.[9]

---

6 Employment Relations Act 2000, s 124.
7 Section 125.
8 *Hong v Auckland Transport* [2019] NZEmpC 54 at [66]; citing *Association of Marine etc Engineers v Tasman Express Line Ltd* [1990] 3 NZILR 946 (LC) at 95.
9 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [68].

[85] Mr Appleton refers to his age, and the difficulty he faces in gaining new employment in the aviation industry. I acknowledge those matters, which go to the reasonableness of reinstatement and support such an order being made.

[86] Mr Appleton's pilot licences are no longer current, which presents some practical difficulties, but I have assumed those could be overcome. I do not consider this issue would prevent an order for reinstatement if it was otherwise practicable and reasonable.

[87] However, and more importantly, while I have found that Mr Appleton was unjustifiably dismissed, I have also found that he contributed to the situation that led to his unjustifiable dismissal. In particular, I found that he did not carry out the pre-flight inspection on 10 December 2019 in the way that he was required to do.

[88] Also, and although I accept that the evidence Mr Appleton gave in Court will have reflected his dissatisfaction over his treatment by Tasman Cargo, and specifically by Tasman Cargo's management pilots, in the context of reinstatement, it is problematic. Mr Appleton compares Tasman Cargo unfavourably with previous airlines for whom he flew, and questions the SOPs. There is a strong sense from his evidence that he considers he knows better than Tasman Cargo. Even at the Court hearing, Mr Appleton's evidence was that he would do the pre-flight inspections if it was clear that he was required to do so. It was a surprisingly equivocal attitude.

[89] The evidence also showed that Mr Appleton had little respect for Tasman Cargo's management pilots. I note that if he were to return to Tasman Cargo, he would be supervised by Captain Sturrock.

[90] In the circumstances, I do not consider that reinstating Mr Appleton into a pilot role at Tasman Cargo would be practicable and reasonable, particularly given the high trust environment that is required in aviation and Mr Appleton's contribution to the situation that led to his dismissal.

Lost remuneration is payable

[91] Mr Appleton says that he has not been able to obtain gainful employment since the termination of his employment with Tasman Cargo, despite attempts to do so.

[92] I acknowledge that the nature of the aviation industry and the reasons for which Mr Appleton was dismissed will have significantly detracted from his ability to find comparable employment. His efforts also, of course, would have been affected by the COVID-19 pandemic and lockdown, which impacted greatly on the aviation industry. Mr Appleton has given evidence of four positions that he applied for and for which he was unsuccessful. It is unclear whether all those positions were within the aviation industry.

[93] Section 128 of the Act requires the Court to order Tasman Cargo to pay to Mr Appleton the lesser of a sum equal to his lost remuneration or to three months' remuneration; that is the default position, however the Court may, in its discretion, order Tasman Cargo to pay to Mr Appleton more than that amount.[10] Mr Appleton's actual loss of earnings sets the upper limit for such an award, but moderation is appropriate.[11]

[94] Mr Appleton seeks reimbursement of lost wages for the approximately three years he has been unemployed. I do not accept that is appropriate. I take into account the need for moderation, the limited evidence as to Mr Appleton's loss of earnings and his attempts to mitigate that loss, but also take into account his limited future employment prospects. I note too that this is not in the category of cases where, even without the unjustifiable dismissal, there was an inevitability that the employment relationship would have come to an early end.

[95] Balancing these factors, I consider that the starting point for an award for lost remuneration to be for the 12 months immediately following the termination of Mr Appleton's employment. I apply a 20 per cent reduction for contribution, leading to an award (after rounding up) equivalent to 10 months' lost remuneration from the date

---

10 Employment Relations Act 2000, s 128(3).

11 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [78]-[79]; *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

of dismissal (including holiday pay on salary and a sum equivalent to the employer superannuation contributions that would have been paid). I assume that calculation can be agreed, deducting any other earnings received by Mr Appleton in that period.[12] If necessary, the parties may apply for further orders.

Interest is payable

[96] Interest is payable on the award for remuneration that would otherwise have been paid had Mr Appleton been employed for the 10 months from 6 April 2020. That is to be calculated on the amount that would have been due each month until the date of payment, beginning on 6 May 2020, and in accordance with sch 2 of the Interest on Money Claims Act 2016.[13] If there is any difficulty in calculating this sum, or there are any problems over the use of the internet calculator referred to in that schedule that cannot be resolved between the parties, leave to apply for further orders is granted.

Compensation is payable under s 123(1)(c)(i) of the Act

[97] Mr Appleton seeks $30,000 as compensation for humiliation, loss of dignity and injury to his feelings.[14] While his distress is not as significant as often seen in cases before the Court, he gives evidence of being distracted by the actions of Tasman Cargo and I accept he would have been humiliated at having lost his job, particularly in the circumstances of a summary dismissal that may lead to the end of his aviation career.

[98] The parties refer to the banding approach the Court has used to assessing non-pecuniary loss.[15] Mr Appleton submits these factors point towards an award sitting in one of the higher bands. Tasman Cargo submits that there is an insufficient evidential foundation to support an award in the higher bands but accepts there is some evidence of harm; it submits an award in the middle of band 1 is appropriate.

---

12 The calculation would not be expected to include investment income.
13 Employment Relations Act 2000, sch 3 cl 14.
14 Employment Relations Act 2000, s 123(1)(c)(i).
15 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337. See too *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62]; and *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162]: band 1 $0-$12,000; band 2 $12,000-$50,000; band 3 over $50,000.

[99] In the circumstances, and taking into account recent compensatory awards, I consider that, but for contribution, Mr Appleton would have been entitled to an award under s 123(1)(c)(i) of the Act of $18,000. Applying a 20 per cent reduction for contribution brings the award to $14,400.

Total payable

[100] Accordingly, Tasman Cargo is ordered to pay Mr Appleton:

(a) A sum equivalent to 10 months' lost remuneration;

(b) Interest on that sum calculated as set out above;

(c) $14,400 under s 123(1)(c)(i) of the Act.

[101] Those sums (less any tax required to be deducted and remitted to the Inland Revenue Department) are to be paid to Mr Appleton within 28 days of this judgment.

Records are flawed

[102] As found in this judgment, the records for the training on 11 and 12 November 2019 and the conclusions in the safety investigation report are flawed; these deficiencies were a significant factor in the personal grievance. It is recommended that Tasman Cargo reinforces the need to keep proper and contemporaneous training records.[16] I also recommend that Tasman Cargo notes the deficiencies in its records for Mr Appleton and that a copy of this judgment is provided to CASA for its information.

Costs are reserved

[103] The parties are encouraged to agree on costs. If that is not possible and an order is sought from the Court, then an application may be filed and served within 28 days of the date of this judgment. Any response then is to be filed and served within

---

16 Employment Relations Act 2000, s 123(1)(ca).

a further 21 days, with any reply to be filed and served within a further seven days. Costs then would be determined on the papers.

J C Holden
Judge

Judgment signed at 2.30 pm on 3 November 2023