IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 76
CRC 42/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SEALORD GROUP LIMITED Plaintiff
AND	AARON PICKERING Defendant

Hearing: 15, 16, 17, 18, 19 September 2014 and 26 January 2015 (heard at Nelson)

Appearances: P Kiely and S Worthy, counsel for the plaintiff
A Sharma, counsel for the defendant

Judgment: 27 May 2015

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Introduction

[1] Between January 2007 and September 2010 the defendant, Aaron Pickering, was bosun on a fishing vessel, the FV Will Watch (Will Watch), which operated out of Mauritius in the Indian Ocean. The plaintiff, Sealord Group Limited (Sealord) was, and still is, directly involved in the administration of the Will Watch and is responsible for the recruitment and management of its New Zealand sourced crew.

[2] It is common ground that on his first voyage on the Will Watch between 21 January and the end of April 2007, Mr Pickering was a Sealord employee working under an individual employment agreement dated 19 January 2007. One of the contested issues in the present case is whether Mr Pickering continued to work in that capacity (as he contends) or whether, after the first voyage, he became an

independent contractor engaged by a Sealord subsidiary, United Fame Investments Limited (United Fame), which is the case for the plaintiff.

[3] At the end of 2012, Mr Pickering brought a claim in the Employment Relations Authority (the Authority) alleging that in September 2010 he had been unjustifiably dismissed by Sealord. In response, Sealord maintained that Mr Pickering was an independent contractor or share-fisher and as such it was able to end his engagement with United Fame in the way that it did.

[4] Mr Pickering was wholly successful in his claim before the Authority. In a determination dated 12 August 2013, the Authority concluded that he had been employed by Sealord and he had been unjustifiably dismissed.[1] The Authority awarded him $71,973.86 on account of lost remuneration and $8,000 as compensation for hurt and humiliation. It found no evidence of contributory conduct on Mr Pickering's part. Interest was awarded on the full amount of the remuneration at five per cent.

[5] In a subsequent determination dated 9 January 2014, the Authority ordered Sealord to pay Mr Pickering a total of $7,822 towards his legal costs, $1,425 towards his accountant's professional fees and $71.56 as reimbursement on the filing fee.[2]

[6] Sealord then challenged both of the Authority's determinations in this Court seeking a full rehearing of the entire matter. Mr Pickering cross-challenged seeking an increase in the relief granted by the Authority. For his lost remuneration he now claims $94,508.21 and as compensation for hurt and humiliation he seeks $20,000. He has also asked for clarification of the date from which interest is payable.

Background

The corporate structure

[7] The corporate structure surrounding Sealord and the operations of the Will Watch is complex but, to the extent that the historical background is relevant to the

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1 *Pickering v Sealord Group Ltd* [2013] NZERA Christchurch 161.
2 *Pickering v Sealord Group Ltd* [2014] NZERA Christchurch 2.

central issues involved in this case, I will endeavour to summarise the position as the Court understands it from the pleadings and the evidence.

[8] Sealord is a long established Nelson-based company engaged in domestic and international fishing operations. Since the late 1980's Sealord has fished internationally for orange roughy and alfonsino. It was, and may still be, recognised internationally as the orange roughy expert. Sealord is 100 per cent owned by Kura Limited (Kura). Kura is the 100 per cent owner of a number of other subsidiary companies including two companies which figured prominently in the evidence, namely, United Fame, which is registered in Hong Kong, and United Fame Investments (Cook Islands) Limited (United Fame Cook Islands), which is registered in the Cook Islands.

[9] In the early 1990's the Will Watch was being operated by Sealord, fishing domestically with an all New Zealand-based crew. Towards the end of the decade its base was moved to Singapore and from Singapore it fished internationally for orange roughy. The vessel had seven to eight New Zealand-based officers and a Filipino crew. The fishing industry was, and no doubt still is, very competitive and in order to distance the Will Watch from Sealord, the vessel was sold to the Hong Kong-based company, United Fame. The name of the vessel was changed to Cheung Shing and it was registered in Panama. Sealord still supplied the New Zealand-based officers for the vessel with the rest of the crew being sourced from the Philippines.

[10] Later, the Cheung Shing moved fishing areas from the eastern to the western Indian Ocean and its base changed from Singapore to the Port of St Louis in Mauritius. Around the same time the vessel was sold to United Fame Cook Islands. It was registered or "flagged" in the Cook Islands and the vessel's name reverted to Will Watch. The Will Watch continues to fish from Mauritius under the Cook Islands' flag. The catch is exported from Mauritius to China and Japan for further processing.

[11] United Fame Cook Islands continues to own the Will Watch and it charges United Fame a charter fee for the right to use and operate the vessel. In March 2009

the shares in United Fame Cook Islands were transferred to Sealord and in July 2010 the shares in United Fame were also transferred back to Sealord. As noted above, United Fame, United Fame Cook Islands and Sealord are all wholly owned subsidiaries of Kura. Kura, which is described in documentation before the Court as "the ultimate New Zealand parent entity and the ultimate parent of the Group", is owned in equal proportions by Nippon Suisan Kaisha Limited and Aotearoa Fisheries Limited.

Crewing

[12] In the fishing industry generally, share-fishing arrangements are common practice. Two typical such arrangements were described in evidence. First, there is the arrangement whereby all parties share in the risk and reward. This is typically used in small inshore fishing operations where the management of the vessel, its operations and crewing, is not complex. The crew's share of the catch tends to be a higher percentage number because the share is related to the amount that is left over after paying all the vessel expenses. This method can mean that if there is no catch the crew can end up owing the owner money for expenses incurred.

[13] The other arrangement, commonly used in speculative or exploratory fishing operations and by operators of large complex ships, is where the vessel owner takes the full risk of the operational expenses. The operator may choose to pay the crew a retainer or advance on earnings and the value of any such payment is taken into account in the final calculation of crew shares. This method offers the crew some stability in earnings but the basic premise is still the same – no catch means no reward. By the same token, it was acknowledged in evidence that share-fishing can be more lucrative than other pay arrangements if the catch goes well.

[14] One of the witnesses for Sealord, Mr Daryl Smith, told the Court that the share-fishing models, in one form or another, are very common in the fishing industry worldwide and he said that, in his opinion, they were probably more common than "the salary/employee system". Mr Smith, a Vessel Coordinator, has been employed by Sealord for 27 years.

The Will Watch

[15] The Will Watch was described as being 70 metres in length with a 1050 gross tonnage. Depending upon how the fuel is managed, a fishing trip out from Mauritius could run for up to 105 days but more typically the vessel holds enough fuel for approximately 85 days at sea. There are normally 42 crew members on the vessel, 35 Filipinos and seven New Zealanders. The ship operates with what is referred to as a "swing crew" so that while the vessel is at sea the other seven New Zealanders will be back in New Zealand on a "swing off".

[16] While at sea, the officers and crew work in shifts and generally the vessel operates for 24 hours a day. As one of the witnesses expressed it, "the gear never stops going into the water". The same witness said that on a typical trip the vessel will steam in a straight line more than halfway across the Indian Ocean towards Fremantle. A good catch was described as around 450 tonnes and generally, on every trip, the aim is to catch over 200 tonnes. The ship is dedicated to catching orange roughy and, in the off-season alfonsino, a mid-water fish requiring a different type of trawling gear.

[17] The Court heard considerable evidence about some of the geographic characteristics of the southern Indian Ocean. Particular reference was made to features such as underwater ridges, hills and tows fished by the Will Watch. The evidence was relevant to allegations that at one point Mr Pickering had divulged valuable confidential information relating to the location of a hill which had not been fished before. Hills were described as undersea features around which fish aggregate particularly when spawning. Tows were said to be paths along which a trawl can be safely towed without snagging on the uneven seabed. Mr Pickering strongly denied the breach of confidentiality allegation but it seemed to be common ground that in the fishing industry knowledge of hills and tows is indeed valuable confidential information.

Mr Pickering's first voyage on the Will Watch

[18] Mr Pickering is 40 years old. He told the Court that he had worked as a seafarer since the age of 21. He briefly explained his employment background

noting that at one stage he had worked on a contract basis for about 18 months as a deckhand on a vessel but he had not enjoyed working as a contractor because he experienced problems in relation to his GST payments which resulted in the Inland Revenue Department (IRD) imposing significant penalties. He, therefore, obtained another position as an employee.

[19] Between August 2005 and June 2006, Mr Pickering was employed by Sealord in its domestic fishing operations under a series of employment agreements being paid on a daily rate.

[20] In late 2006 a family friend, Mr Phil Gaugler, who worked for Sealord on the Will Watch, contacted Mr Pickering to sound out his interest in a bosun's position on the vessel which had become available. Mr Gaugler arranged a luncheon meeting between Mr Pickering and Mr Charlie Shuttleworth, one of the skippers of the Will Watch. Mr Shuttleworth recalled in evidence how Mr Pickering told him that he did not want to be engaged as a contractor because he had worked as a contractor previously and it did not suit him to work that way as it was too difficult for him to manage. Mr Shuttleworth explained that he did not have to be employed as a contractor and not everybody on the Will Watch worked that way but he told Mr Pickering to make his intentions in this regard known when he met with Mr Paul Taylor, the ship's husband, to sort out the paperwork.

[21] Mr Pickering confirmed in evidence that prior to joining Sealord, he had worked as an independent contractor for about 18 months for Endurance Fishing Limited but he had incurred a $10,000 GST payment which, with compounding penalties, had escalated to about $20,000. Documentation was produced which showed that the IRD proceeded to deduct payments from Mr Pickering's earnings with Sealord in repayment of that debt and Mr Pickering said those payments continued to be deducted from his earnings right up until his dismissal.

[22] After their luncheon meeting, Mr Shuttleworth contacted Mr Taylor and told him that he had employed Mr Pickering to work on the Will Watch. He told Mr Taylor that Mr Pickering would contact him to sort out his pay details. Mr Pickering then telephoned Mr Taylor and told him that his clear preference was

to be paid as an employee based on Mr Shuttleworth's advice that he had a choice to work as an employee or contractor. Mr Pickering said that Mr Taylor was very accommodating and indicated that it was not a problem. Mr Taylor explained that they would meet in Mauritius before the ship sailed and he would bring with him an employment agreement for Mr Pickering to sign.

[23] There was conflicting evidence about the details of the meeting in Mauritius, but the end result was that Mr Pickering signed a fixed term employment agreement with Sealord on 19 January 2007, which was just before the Will Watch sailed on Mr Pickering's first trip on 21 January. The agreement provided that Mr Pickering was offered the position of Bosun on the Will Watch as "a temporary position for one trip and will commence on 14 January 2007". His rate of pay was $418 gross per seagoing day.

[24] Mr Pickering's first voyage on the Will Watch appeared to be uneventful. Mr Taylor confirmed that he had received positive feedback from the skipper and crew about Mr Pickering's performance and Mr Pickering had told him that he had enjoyed his trip and was keen to stay on and so Mr Taylor agreed to keep him on.

The return to Nelson

The fixed term agreement

[25] It was Sealord's case that Mr Pickering's fixed term employment agreement dated 19 January 2007 terminated at the end of his first fishing trip and from 26 May 2007 he was no longer an employee of Sealord but he worked as an independent contractor for United Fame. Sealord contends that under the share fishing arrangement with United Fame he was paid a daily advance of $185; he was entitled to a percentage share of the value of the catch during fishing trips and he was paid for trips on (when he was on board the vessel) and trips off (when he was not on board the vessel).

[26] Ms Sharma, counsel for Mr Pickering, submitted that there was no evidence to show that Mr Pickering had been engaged as a contractor by United Fame. Her

submission was that the only written agreement Mr Pickering entered into was the fixed term employment agreement with Sealord dated 19 January 2007.

[27] In relation to that agreement, Ms Sharma correctly submitted that it did not meet the requirements of s 66 of the Employment Relations Act 2000 (the Act) for a fixed term employment agreement in that:

(i) It was for the purpose of assessing Mr Pickering's suitability for permanent employment in contravention of s 66(3)(b).

(ii) It did not advise Mr Pickering when or how his employment would end in contravention of s 66(2)(b).

(iii) It did not advise Mr Pickering in writing of the way the employment relationship would end, or the reason for ending the employment that way, as required by s 66(4) of the Act.

[28] While non-compliance with s 66(4) of the Act does not affect the validity of an employment agreement, the effect of the provisions of s 66(6) meant that in relation to the present case, Sealord could not rely on the statement in the agreement that it was for one trip only in order to end the employment relationship unless Mr Pickering agreed. Ms Sharma submitted that non-compliance with the statutory requirements, therefore, rendered the agreement as being of indefinite duration.

[29] In his submissions in response on this issue, Mr Kiely, counsel for Sealord, submitted that whether or not the employment agreement complied with s 66 of the Act was not relevant to Mr Pickering's status after April 2007 because Sealord did not rely on the fixed term nature of the employment agreement to end the relationship.

The alleged contract

[30] Sealord's case was that as from the end of May 2007 the parties agreed that a new contracting relationship would be established between Mr Pickering and United

Fame. It was submitted that the new share fisher contract would have superseded and extinguished the previous fixed term employment relationship.

[31] Unfortunately for Sealord, I found its evidence on this issue unconvincing. Its key witness, Mr Taylor, told the Court:

> I do not recall specifically if Mr Pickering signed a Share Fishing contract however I am sure that I would have, as in my mind, he would have been operating as a contractor and was not an employee.

[32] No such contractual document could be produced. Mr Taylor was unable to give any evidence about where and when Mr Pickering would have signed such a contract. Nor was he able to give any rational explanation as to how and why it would have gone missing, had it ever existed. Mr Taylor said that Mr Pickering's employment agreement dated 19 January 2007 had been drawn up by Sealord's Human Resources Department (HR) and he believed that HR would also have drawn up the contract between Mr Pickering and United Fame but no one from HR was called as a witness to support that proposition. I found Mr Taylor's evidence in relation to the contractual documentation generally, disturbingly vague. On this particular aspect of the case, I did not find him a credible witness.

[33] For his part, Mr Pickering said that at no time during his employment with Sealord was he ever shown or made aware of the existence of a share-fisher's contract with United Fame and I accept his evidence in that regard. I find his conduct throughout consistent with his clearly expressed view that he did not wish to work as a contractor on the Will Watch and, insofar as he was concerned, he remained an employee of Sealord. He did not pay GST and his PAYE tax was deducted at source and paid to the IRD by Sealord. After his dismissal Mr Pickering did not approach United Fame alleging breach of contract or the like but Ms Sharma proceeded on the basis that he was an employee of Sealord. She wrote to Sealord raising a personal grievance on Mr Pickering's behalf. Her letter was directed to Sealord's Human Resources Manager.

[34] The principal evidence Sealord relied upon in support of its claim that from May 2007 Mr Pickering was engaged as a contractor, was an email which Mr Taylor sent to Ms Margaret Brien at Sealord payroll on 11 June 2007. The email stated:

> Hi Margaret
>
> Will Watch last discharge did not involve a crew change apart from John Teece leaving and Mike Sara joining
>
> John's last day on pay was Monday 28th May
>
> John took a US$500 cash advance
>
> Mike Sara has a new rate of $356/day for this trip
>
> His first day on pay was Wednesday 23rd
>
> Mikes (sic) has outstanding deductions from last trip which must be recovered
>
> ***I have agreed to start Aaron Pickering on a $185 direct a daily rate as of 26 May. I will pay him a bonus at end this trip so will deduct the advance***
>
> ***Aaron also has some outstanding advances***
>
> Thanks Paul

[35] Mr Taylor said in cross-examination that the terms "bonus" and "deduct the advance" were terms that only applied to a share-fishing agreement but the witness acknowledged, and the evidence was clear, that on the Will Watch there were exceptions to the general rule that the New Zealand-based crew were engaged by United Fame as independent contractors. There was undisputed evidence that, apart from Mr Pickering, there were other New Zealand-based crew on the Will Watch at different times who were paid on a percentage of the catch basis.

[36] Much time was spent in the course of the hearing analysing the pay records and other documentation relating to the crew on the Will Watch over the years which established the exceptions to what Mr Taylor referred to as the "general rule" that fishers were contractors and not employees. I do not intend to traverse that evidence on a case-by-case basis apart from making reference to the position of one crew member, Mr Edward Curry, whose situation appeared to be not dissimilar to Mr Pickering's. Mr Curry was employed by Sealord as the second mate on the Will Watch between 3 December 2007 and 10 May 2010.

[37] It was accepted that Mr Curry was a Sealord employee rather than an independent contractor but he was still paid a share of the catch. When Mr Taylor was asked about Mr Curry's position in cross-examination he said that it could be

explained because Mr Curry was formerly a bosun on the Sealord vessel "Paerangi" and when the Paerangi was sold he was offered a position on the Will Watch rather than redundancy. I did not find that explanation a convincing answer to Mr Pickering's assertion that he too was a Sealord employee paid on a share of the catch basis. In fact, it simply confirmed to the Court that Mr Taylor had the flexibility necessary to enter into different employment arrangements to suit the individual case.

[38] The provisions and protections of the Act apply only to employees and employers engaged in an employment relationship and not to independent contractors. Section 6 of the Act provides a definition of "employee" for the purposes of the Act. Sections 6(2) and (3) require the Court to determine the real nature of the relationship and for such purposes it must consider all relevant matters and not treat as the determining factor any statement by one of the parties describing the nature of the relationship.

[39] I have not found it necessary to refer in this judgment to the various authorities that have dealt with the issue of what constitutes "all relevant matters" for the purposes of s 6(3) of the Act. A significant factor in the present case, which distinguishes it from many of the other cases referred to in the authorities, is the fact that there was a document in existence between the parties and that document, dated 19 January 2007, was clearly an individual employment agreement – not a share-fisher contract. No other written agreement or contract ever came into existence and the only verbal variation subsequently agreed to related simply to the method of payment. In all other respects, the fixed term individual employment agreement of 19 January 2007 continued to endure until the time of Mr Pickering's eventual dismissal.

[40] On this first issue, therefore, after taking into account the relevant statutory criteria, I agree with the Authority that at all material times Mr Pickering was a Sealord employee working on the Will Watch.

Mr Pickering's dismissal

[41] Mr Shuttleworth, the skipper of the Will Watch, had his contract terminated abruptly on 13 November 2009. He told the Court that it was because he had refused to agree to a proposed drop in income but, whatever the reason, he was informed that his contract had been terminated because his services were no longer required. He said that the termination "left a sour taste in his mouth". Sometime later (there was a conflicting evidence as to the date) Mr Shuttleworth entered into a contract with Austral Fisheries, another fishing company operating out of Mauritius to work on the Southern Champion. The Southern Champion had been fishing in Southern Antarctic waters but about the time that Mr Shuttleworth joined the crew, it moved its operations to the Indian Ocean where it was going to be fishing over the same grounds as the Will Watch. Mr Shuttleworth's first trip on the Southern Champion was as a mate but he was then appointed skipper of the vessel.

[42] Mr Shuttleworth's replacement as skipper of the Will Watch was Mr Christopher Howarth. Mr Howarth was appointed permanent skipper of the Will Watch from 6 December 2009 and he still holds that position. Mr Howarth first met Mr Pickering when he started on the Will Watch in 2007. At that stage, Mr Howarth was a second mate on the vessel. Mr Howarth said in evidence that he was aware that at the time he was appointed permanent skipper of the Will Watch that some of the crew were unsettled over Mr Shuttleworth's sudden departure. Mr Howarth said that he was anxious to reassure the crew that they all needed to work effectively together to catch fish and do well.

[43] The narrative then moves forward to August 2010 when Mr Pickering returned to Nelson after another fishing trip on the Will Watch. He expected to have two and a half months off as a paid trip before he was due to sail again on the Will Watch on 12 October 2010. Unbeknown to Mr Pickering, however, at the completion of the August trip Mr Howarth had spoken to Mr Taylor and had made it clear that he would not take Mr Pickering on the next trip as he believed he had disclosed confidential fishing information to Mr Shuttleworth. He further alleged that Mr Pickering did not respect him, was undermining his authority on the vessel and he also accused him of acting as a "bully" in relation to the Filipino crew.

[44] On 17 September 2010, Mr Taylor telephoned Mr Pickering. Mr Taylor told the Court that he told Mr Pickering that "we would not be offering him any more trips on the Will Watch". Mr Pickering's evidence was that Mr Taylor told him that he was required to hand in his notice because things were not working out on the boat. Mr Pickering could not discuss the matter further at that stage because he was about to attend a funeral of a good friend. He told Mr Taylor that he would call and see him at his office on Monday, 20 September 2010.

[45] Mr Pickering said that at the meeting, Mr Taylor told him that things were not working out and he should resign from his job on two weeks' pay. Mr Pickering indicated that was "very unfair" and Mr Taylor than offered to pay him one month's pay if he tended his resignation in writing. Mr Pickering refused to resign and the meeting ended.

[46] On 23 September 2010, Mr Taylor called Mr Pickering at his home and again asked him about resigning and reaching some settlement with Sealord. Mr Pickering refused. He said that he was "gutted" and could not understand what was happening and why.

[47] On 27 September 2010, Mr Taylor again called Mr Pickering at his home. Mr Taylor said that on that occasion he offered to pay Mr Pickering for two months but Mr Pickering told him that the matter was in the hands of his lawyer and he was not interested in talking any more about it. Mr Pickering told the Court that by that stage he was feeling "extremely distressed and upset over what now seemed to be the inevitable sudden loss of my job" and he had consulted with Ms Sharma and taken legal advice in the matter.

[48] Mr Taylor said that he acted as he did because he believed that Mr Pickering was a contractor rather than an employee but I have already determined that issue. In any event, I find it surprising, given his position in the company, that Mr Taylor was unable to produce any notes or other record of his various discussions with Mr Pickering. The dates of the discussions I have just referred to were given in evidence by Mr Pickering, not by Mr Taylor. Mr Taylor indicated at one point that

he would have recorded notes in a work diary but the diary has never been produced and I did not find his evidence on this point convincing.

[49] The precise date of Mr Pickering's dismissal was not identified by either party but, on 24 September 2010, Mr Pickering instructed Ms Sharma to write to Sealord raising a personal grievance under the Act. Ms Sharma proceeded accordingly.

The allegations

[50] Sealord's position was that if the Court concluded that Mr Pickering was a Sealord employee then his dismissal was justified under s 103A of the Act.

[51] As the dismissal took place prior to 1 April 2011, the relevant legal test of justification was that set out in s 103A(2) which at the time provided:

> **103A Test of justification**
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> (1) … the question of whether a dismissal or an action was justifiable must be determined, on an objective basis , by considering applying the test in subsection (2).
>
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at time the dismissal or action occurred.

[52] The case for Sealord was that Mr Pickering's dismissal was substantively justified on the basis of an irretrievable breakdown in the necessary trust and confidence that an employer must have in an employee. It was alleged that the irretrievable breakdown stemmed from two interrelated factors. First, poor performance and secondly, the allegation that Mr Pickering had disclosed confidential fishing information. I will consider each allegation in turn.

Poor performance

[53] Mr Kiely succinctly, and correctly, summed up as follows Sealord's poor performance issues with Mr Pickering, based on the evidence of Mr Howarth and Mr Taylor respectively.

[54] Mr Howarth's evidence:

a) He was not a consistent and reliable performer.

b) He was "consistently disappointed by Mr Pickering's lack of work ethic and commitment. His attitude was very often poor and I could simply not rely on him to do his job."

c) While in port he would leave work without authorisation.

d) He did not participate fully in necessary tasks while in port.

e) Even after a warning as to his performance and agreement that his performance would improve in May 2010, he continued to "slack off" at work and leave the vessel during port visits.

f) He could not be trusted and did not want to work with the rest of the crew or the skipper.

[55] Mr Taylor's evidence:

a) Mr Pickering went into "cruise mode" in port.

b) He was not working around the ship while in port and would leave others to carry out work.

c) He did not properly supervise the Filipino crew for instance in ensuring paint was properly applied and cured.

Disclosure of confidential information

[56] The evidence regarding the alleged disclosure of confidential information by Mr Pickering was given by Mr Howarth, who had taken over from Mr Shuttleworth as skipper of the Will Watch. The incident took place in March 2010 not long after Mr Howarth had completed his first voyage as skipper of the Will Watch (on 17 February 2010) and returned to his home in Dunedin. Mr Pickering, who had

been on the same voyage, had returned to his home in Nelson. Mr Shuttleworth was also in Nelson at that time. Mr Howarth told the Court:

> 20. During Mr Pickering's trip off in March 2010 I got a phone call one night at around 10pm from Charlie Shuttleworth who, by then was working for a competitor on a vessel also out of Mauritius, called Southern Champion. I knew the number was Mr Pickering's home phone number because it came up on my iphone as Mr Pickering's number.
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> 21. Mr Shuttleworth was drunk and slurring his speech badly. At times he was screaming down the phone to me. He insisted that I should leave my crew alone, referring to Kerry Gilmour, Mr Pickering and Zac Beloe. This was because on the previous trip all three had brought illegal fireworks from Mauritius on board the vessel and were storing them in their cabins, which was a huge fire risk. I asked all three to dispose of their fireworks. Later at sea Zac and Kerry were caught still with the fireworks and were disciplined for it.
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> …
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> 23. Mr Shuttleworth also informed me that he knew where we had caught fish the last trip saying "I know you were down on those 'certain hills' at 90 East, I know the ones, I've been there" and that "you can't keep it secret from me". I reminded him at this point as I had several times throughout the phone call, that he was talking to me on Mr Pickering's home phone as it was showing on my iphone. He told me he didn't give a fuck. I hung up on him, he kept calling me back and in the end I switched my phone off.
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> 24. The information concerning the location of the hills was confidential information known only to four of the crew on the vessel. It was devastating to discover that fishing locations had been leaked to a rival fisher and that someone in my crew was leaking information to our opposition. This leak could be worth millions of dollars to Sealord in loss of revenue and not the least to my remuneration.

[57] In his evidence, Mr Shuttleworth admitted making the call to Mr Howarth from Mr Pickering's home in the Rai Valley where he had stayed overnight. He admitted that he also drank "a few beers" with Mr Pickering but he did not agree that he "was so drunk that (he) was screaming down the phone at Howie". Mr Shuttleworth gave the Court his version of the telephone conversation but I have no difficulty in rejecting it as unreliable, given his state of intoxication, and I accept Mr Howarth's evidence on the matter.

[58] Mr Pickering told the Court that Mr Shuttleworth had made the phone call after he had gone to bed but he had told him about it the following morning.

Mr Pickering said that on his return to Mauritius, Mr Howarth approached him about the telephone call and accused him of giving information to Mr Shuttleworth about the fishing spots in the Indian Ocean. Mr Pickering denied the allegation.

The procedure

[59] In her submissions, Ms Sharma highlighted the concession she had obtained from Mr Howarth in cross-examination that he had made an assumption that Mr Pickering had passed on the confidential information to Mr Shuttleworth but, in my view, in all the circumstances, it was a reasonable assumption for Mr Howarth to have made. Ms Sharma was on stronger grounds however, when she proceeded to highlight in her submissions the procedural defects in Sealord's investigation of the performance issues and the breach of confidence allegation in the period leading up to Mr Pickering's dismissal.

[60] Ms Sharma correctly submitted that none of the performance allegations identified by Mr Kiely (see [54] and [55] above) had been raised with Mr Pickering prior to his dismissal. She stressed that there had been no disciplinary investigation of any sort and Mr Pickering had received no warnings about any of the complaints that had been raised against him. Ms Sharma noted that the only documentation in existence that had expressed any concern about Mr Pickering's performance was an email from Mr Taylor to Ms Mary Lewis in Sealord's HR department dated 4 October 2010 but that email did not come into existence until after Mr Pickering's dismissal.

[61] Likewise in relation to the breach of confidence allegation. Although Mr Howarth had approached Mr Pickering about the matter on their return to Mauritius and accused him of giving information to Mr Shuttleworth, the allegation was never put to Mr Pickering in a formal manner or investigated by Sealord in the fair and reasonable way the Act contemplates a disciplinary investigation will be carried out.

[62] In relation to procedural justification, Mr Kiely submitted that Mr Pickering was informed at a meeting held in May 2010 with Mr Howarth, Mr Taylor and

Mr Gaugler of serious concerns about his performance. Mr Pickering denied that such a meeting had taken place. Admittedly, Mr Taylor and Mr Howarth had given evidence about such a meeting but there was not one piece of documentary evidence produced in relation to the alleged meeting, apart from a brief mention in a paragraph in the self-serving email from Mr Taylor to Ms Lewis referred to above which was written on 4 October 2010, well after Mr Pickering had been dismissed. I am not satisfied on the evidence that any type of disciplinary meeting involving Mr Pickering was, in fact, held in May 2010.

[63] As the full Court noted in *Angus v Ports of Auckland Limited* there have been long established guidelines for determining whether an employer in any given circumstances has followed a fair and reasonable procedure.[3] The minimum requirements of those guidelines are that the worker must receive notice of the specific allegation of misconduct and the likely consequences if the allegation is established; an opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct and, finally, the employer must give an unbiased consideration of the worker's explanation free from predetermination and the relevant considerations. These requirements are also embodied in an employer's good faith obligations under s 4(1A)(b) and (c) of the Act.

[64] Applying those same guidelines to the facts of the present case, I agree with Ms Sharma that Mr Pickering's dismissal was procedurally seriously defective. Sealord complied with none of those basic requirements. How Sealord acted, was not the way in which a fair and reasonable employer would have acted in all the circumstances at the time. I concur with the Authority's conclusion that the dismissal was unjustifiable in terms of the statutory test of justification.

Remedies

Lost remuneration

[65] Having upheld Mr Pickering's personal grievance and being satisfied on the evidence that he would have lost at least three months' remuneration as a result of

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3 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [47].

his dismissal, the Court is required under s 128(2) of the Act to reimburse Mr Pickering for the income lost over that three-month (or 13-week) period.

[66] Under s 128(3) of the Act the Court also has a discretion to order an employer to pay a greater sum as compensation for lost remuneration but, as the Court of Appeal made clear in *Sam's Fukuyama Food Services Limited v Zhang* moderation is required in fixing awards for lost remuneration and any such award must have regard to the individual circumstances of the particular case.[4]

[67] In *Zhang* the Court of Appeal further stated:[5]

> But that is not the end of the analysis. It is also necessary to have regard to the counter-factual analysis and make an allowance for all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the respondent's employment.

[68] A dismissed employee has an onus to mitigate his or her loss and then to establish any resulting economic loss claim to the satisfaction of the Court. As was stated by Chief Judge Colgan in *Allen v Transpacific Industries Group Limited*:[6]

> However, dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for seeking employment.

[69] Mr Pickering's evidence in relation to his attempts to mitigate his loss and his claim generally for reimbursement of lost remuneration was less than satisfactory. Without providing data or any other details, he simply "asserted", as Mr Kiely correctly described it, that he had contacted two fishing companies for work and bought newspapers and searched Trade Me. He worked for Marlborough Mussel Company Limited for a period and then he obtained casual work on one of Sanford's mussel harvesters. In December 2010 he obtained a position through Mr Shuttleworth on the Southern Champion which was still based in Mauritius but he was dissatisfied with the pay. Then, following his return to New Zealand, he took

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4 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, at [36].
5 *Sam's Fukuyama Food Services Ltd v Zhang*, above n 4, at [37].
6 *Allen v Transpacific Industries Group Ltd* [2009] NZEmpC 38; (2009) 6 NZELR 530 at [78].

up a position as a bosun with Endurance Fishing Company Limited. Since 2013 (the month was not disclosed) Mr Pickering has worked for Sanford, another fishing company. Mr Pickering did not produce any documentation in support of this evidence and no details were provided of his earnings from the employment described, or of the periods worked.

[70] Notwithstanding the unsatisfactory nature of Mr Pickering's evidence in relation to mitigation and Mr Keily's submissions on the matter, I am prepared to accept that Mr Pickering did make genuine efforts to mitigate his loss.

[71] It was common ground that after his dismissal, Mr Pickering was paid up until 18 October 2010. His claim for lost remuneration subsequent to that date was based on evidence presented by Ms Heidi Tapper, an experienced practising chartered accountant who had formerly worked for the IRD. The problem I have with the evidence given by both Ms Tapper and Mr Pickering in relation to the claim for lost remuneration is that it was based around the findings of the Authority on the issue.

[72] The Authority awarded Mr Pickering 50 weeks' of lost earnings made up of the mandatory 13 weeks plus a further 37 weeks. The total award on the Authority's calculations amounted to $71,973.86. Before me, Ms Tapper produced her own calculations showing that the figure of $71,973.86 was commensurate with an award of only 40 weeks. On the witness's calculations the amount Mr Pickering ought to have been awarded for 50 weeks remuneration should have totalled $94,548.21.

[73] Both Mr Pickering and Ms Tapper seemed to proceed on the basis that this Court would simply adopt the same approach as the Authority and fix the lost remuneration claim at a figure based on 50 weeks' loss of earnings. I mean no disrespect to Ms Tapper, because she was obviously acting on instructions, but this is a challenge de novo which involves a complete rehearing and this Court is not bound by any findings or conclusions reached by the Authority.

[74] The other unsatisfactory feature of Mr Pickering's economic loss claim is that it was based on an averaging of his historical pay. The evidence was that

Mr Pickering had been replaced as bosun on the Will Watch by a Mr Nuttall. Sealord was able to produce figures showing Mr Nuttall's actual earnings from subsequent trips on the Will Watch after Mr Pickering's dismissal. In cross-examination by Mr Worthy, Ms Tapper fairly conceded that the information regarding Mr Nuttall's actual earnings was a more reliable indicator of Mr Pickering's actual loss than historical averages but she told the Court that Mr Nuttall's details had not been available to her at the time she carried out her calculations.

[75] I do not share the Authority's optimism that the employment relationship would have endured for another 50 weeks had Mr Pickering not been dismissed. The signs were there from an early stage that Mr Pickering and Mr Howarth, who had taken over from Mr Shuttleworth as skipper of the Will Watch, were not getting along. On the other hand, it was clear from the evidence that Mr Pickering had enjoyed an extremely close working relationship with Mr Shuttleworth, the previous skipper, and that relationship continued after Mr Shuttleworth had left Sealord.

[76] Mr Pickering described Mr Howarth as having "a completely different personality" to Mr Shuttleworth. He said that he kept his "head down" when working for Mr Howarth because he (Mr Pickering) was "not a person who likes conflict, and where possible will do what I can to accommodate others." Despite these admirable sentiments, the evidence showed a strained relationship which was progressively deteriorating. Allowing for the "contingencies" referred to by the Court of Appeal in *Zhang*, I do not consider that Mr Pickering would have remained with Sealord beyond the end of that particular financial year, being 31 March 2011.

[77] If the Court is asked to exercise its discretion under s 128(3) of the Act to order compensation for remuneration lost until some date beyond the mandatory three months' period, then it ought to be possible, without too much difficulty, to calculate from the evidence before it the amount of the loss that would correspond with the date decided upon. In this case, however, I found that exercise to be virtually impossible without resorting to the Authority's determination. I also obtained assistance from other documentation before the Authority, including an affidavit Mr Pickering had produced "in respect of his earnings". That particular

affidavit was included in the bundle of documents produced in this Court but its contents were significant and what he had to say should have been presented as part of Mr Pickering's *viva voce* evidence.

[78] In the circumstances of this particular case, it is not practicable to simply pick a date such as 31 March 2011 and then calculate the precise lost remuneration from that date because the Will Watch was at sea and did not return to port until 10 April 2011. I note, however, that based on Mr Nuttall's figures, the Authority accepted that the figure of $50,468.53 would have represented Mr Pickering's approximate earnings up until 31 March 2011. That particular conclusion was not contested before me. In the circumstances, I am prepared to accept that pursuant to s 128(3) of the Act, Mr Pickering has made out a claim for compensation for remuneration lost in the sum of $50,468.53.

[79] Helpfully, the Authority determined that Mr Pickering's actual earnings over that same period until 31 March 2011 amounted to $33,596.70. That total was made up of the earning figures the Authority cited from each of Mr Pickering's temporary employment situations over the relevant period, and as they were not disputed in this Court, I accept them. Deducting this amount from his likely earnings figure of $50,468.53 leaves a net amount of $16,871.83 and that is, therefore, the total sum I award to Mr Pickering on account of his lost remuneration.

[80] Interest was sought but the award I have just made is not based on any precise contractual amounts but on generalities and I do not consider it appropriate, in those circumstances, to make any allowance for interest.

Compensation for hurt and humiliation

[81] Under this head, Mr Pickering claims the sum of $20,000, alleging that he had suffered hurt and humiliation at a higher threshold than a standard personal grievance. Mr Pickering said that approximately 12 months before his dismissal his marriage had ended. He passed ownership of the matrimonial home to his wife believing that he would continue to be able to get himself forward financially based on the income he generated working for Sealord. He said that he had been left with

no job and no money but just bills, including child support which all made for an extremely stressful situation.

[82] Mr Pickering described how he had to sell off many of his personal possessions at well below market value in order just to keep himself afloat. Evidence was given in support by his uncle, Mr Carl Harris, and a close friend, Mr John Craddock, confirming how Mr Pickering had become noticeably stressed and depressed over his financial situation following his dismissal. He struggled financially and was unable to buy Christmas gifts for his children, whereas he had always been a very committed father to his two daughters. I accept that evidence.

[83] Mr Kiely submitted that there were no aggravating features in this case such as vindictiveness or bad faith and there was no high-handed or outrageous conduct during the dismissal process which could be said to have unduly humiliated Mr Pickering or caused him unnecessary stress or injury.

[84] I take into account Mr Kiely's submissions but I am nonetheless satisfied that Mr Pickering has made out a case for significant compensation for humiliation, distress and injury to feelings under 123(1)(c)(i) of the Act and under this head I award him the sum of $15,000.

Contribution

[85] Section 124 of the Act requires the Court, when determining remedies for an established personal grievance, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and reduce the remedies awarded accordingly.

[86] In this case the Authority concluded that there was no evidence to establish that Mr Pickering had engaged in any blameworthy conduct that gave rise to the personal grievance and declined to order any reduction in the remedies awarded on the grounds of contribution. Ms Sharma invited the Court to adopt the same approach. For his part, Mr Kiely submitted that Mr Pickering contributed to the situation leading to his grievance through his poor performance and disclosure of confidential information and he sought a 100 per cent reduction in remedies.

[87] I accept that Mr Pickering's disclosure of confidential information to Mr Shuttleworth about fishing locations which resulted in Mr Shuttleworth's late night drunken outburst in the phone call with Mr Howarth did contribute towards the situation that gave rise to the personal grievance. Mr Pickering would have been fully aware of the importance of confidentiality in the fishing industry and it was spelt out in his employment agreement. By the same token, I do not think it is fair to attribute everything that Mr Shuttleworth said in the course of that telephone conversation to Mr Pickering. Mr Shuttleworth was familiar with the operations of the Will Watch and, therefore, able to speak with some authority on the matters he raised with Mr Howarth.

[88] Furthermore, I do not consider that Mr Pickering can be said to have contributed in any significant way to the performance issues raised by Sealord. If those matters had been properly handled by Sealord, conceivably the outcome may have been quite different. Taking all these factors into account, I have assessed Mr Pickering's overall contribution under s 124 of the Act at 30 per cent and the remedies awarded above are to be reduced accordingly.

Costs

[89] The parties have appropriately asked for costs to be reserved. It was also agreed that the Court would not at this stage deal with the plaintiff's challenge to the costs award made by the Authority. The defendant will be entitled to costs in both the Authority and this Court. The parties are represented by experienced counsel and I would hope that they would be able to reach agreement on costs. I simply make the point at this stage that any award of costs would need to take into account the fact that on this challenge the plaintiff has had a large measure of success in relation to remedies. If, however, agreement cannot be reached on the costs issue then Ms Sharma is to file submissions within 28 days and Mr Kiely will have a like period of time in which to respond.

Conclusions

[90] For the reasons stated above, my conclusions are:

(a) At all material times the defendant was an employee of Sealord;

(b) The defendant was unjustifiably dismissed by Sealord;

(c) The defendant is awarded the sum of $16,871.53 for lost remuneration;

(d) The defendant is awarded $15,000 for hurt and humiliation;

(e) The remedies in (c) and (d) are to be reduced by 30 per cent on account of contributory conduct;

f) All issues of costs are reserved.

A D Ford
Judge

Judgment signed at 4.30 pm on 27 May 2015