Determination Number: CA 10/07
File Number: 5072931

*Under the Employment Relations Act 2000*

# BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

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| **BETWEEN** | DV Ryboproduckt Limited (Applicant) |
| **AND** | The 49 crew of the MFV "Aleksandr Ksenofonotov" (Respondent) |
| **REPRESENTATIVES** | Peter Dawson, Counsel for the Applicant<br>Kathy Whelan, assisted by Rona Daysh, Counsel for the Respondent |
| **MEMBER OF AUTHORITY** | James Crichton |
| **INVESTIGATION MEETING** | Dunedin 29 and 30 November 2006<br>Wellington 7 December 2006 |
| **DATE OF DETERMINATION** | 30 January 2007 |

DETERMINATION OF THE AUTHORITY

***History***

[1] This matter came before the Authority by way of an urgent application from the applicant DV Ryboprodukt (*DVR*) and by virtue of the fact that the *Aleksandr Ksenofontov* (*the vessel*) was alongside at Port Dunedin, the application was heard urgently in Dunedin because I was there dealing with other matters.

[2] In essence, DVR alleged that the respondent crew of the vessel (*the crew*) had refused to leave the vessel at the end of their contract of employment, thus preventing DVR from re-crewing the vessel and having her put to sea again.

[3] In addition, the inability of the parties to agree a basis on which the crew would leave the vessel meant that the crew were without their final pay and, as the crew were Ukranian nationals and were due to return to Europe at the end of their contract of employment, a further consequence of the stalemate was that it was not possible to arrange for the repatriation of the crew to Europe.

[4] As I was able to allocate time to hearing the matter in Dunedin provided I extended my visit there, I granted the application for urgency on the basis that the crew were given an opportunity to obtain proper advice and to appropriately participate in the Authority's investigation meeting.

[5] I also waived the usual requirements of formal briefs of evidence being prepared in order that the matter could be brought on with urgency.

[6] By virtue of the fact that none of the crew spoke good enough English to enable them to be understood in an investigation meeting, and indeed that many of the witnesses that I would need to interview had no English at all, of necessity I was reliant on the services of an interpreter. It is appropriate that I pay tribute to the excellent service given to the Authority by Mr Andrew Barrett whose fluent Russian and pleasant cooperative manner put the Ukranian crew and the other Russian-speaking representatives of DVR very much at their ease. Without

Mr Barrett's assistance, the investigation meeting would simply not have been able to be held at all. The Authority and the parties owe him a debt of considerable gratitude.

[7] It is also appropriate that I express the Authority's thanks to Mr Ian McAndrew, a very experienced mediator with the Department of Labour at Dunedin, who became involved in the dispute between the parties when he was asked to mediate between them. Mr McAndrew presided over three mediations between the parties, the first two (those on 20 November and 27 November 2006) before the Authority became involved. Mr McAndrew was of incalculable assistance to the Authority in providing an excellent briefing on the situation (without, of course, betraying any of the confidences from the mediation process). Mr McAndrew subsequently presided over a third and final mediation on 2 December 2006 at which an aspect of the parties' dispute was resolved in terms of a mediated settlement under s.149 of the Employment Relations Act 2000.

***Employment relationship problem***

[8] By statement of problem filed on 28 November 2006, DVR made application to the Authority for an urgent hearing (an aspect I have already dealt with) and sought a determination from the Authority:

(a) On what hours the crew worked;

(b) The issue of deductions from the crew's wages;

(c) The terms of the employment agreement between the parties; and

(d) The entitlement of the crew to remain aboard the vessel while the other issues are determined.

[9] Because of the exigencies of DVR's ex part application, no statement in reply was filed and, as I have described already, the matter proceeded just as soon as the parties and their representatives could be gathered together.

[10] The vessel is owned by DVR but on time charter to a New Zealand company, Fish Market Holdings Limited. DVR says that the crew are employed in terms of a written employment agreement dated 10 May 2006 although the crew say, inter alia, that that employment agreement does not bind them because they did not know its terms.

[11] The effect of the employment agreement was to have an engagement for the crew of six months and that engagement was due to come to an end in November 2006. Accordingly, on 18 November 2006, the vessel berthed at Port Dunedin to effect a crew change and to take on fuel.

[12] Representatives of DVR attended at the ship that same day to pay off the departing crew. All of the various materials necessary to achieve this were to hand; there was a payslip for each crew member together with an individual cash payment for the full amount of each crew member's entitlement together with arrangements for the crew to be repatriated to their homes in Europe.

[13] The crew disputed that the calculation of the moneys owed to them was correct and they refused to leave the vessel. This put DVR to expense because:

(a) The ship was not able to return to her normal schedule and eventually to sea to fish;

(b) A loss was sustained on having to cancel airline tickets for the crew; and

(c) There was a continuing cost in accommodating and feeding the new crew which had by this time already arrived from Europe.

[14] DVR invoked what they thought were the appropriate dispute resolution processes, participated in two mediations with the crew and, those not resolving the differences between the parties, then applied to the Authority for a determination of the issues in dispute between the parties.

***Issues***

[15] It will be helpful to consider the basis on which DVR and the crew (both foreign nationals) come before the Employment Relations Authority in Dunedin, New Zealand and that is the first matter I will consider.

[16] Then I must look at the issue of deductions where again there is disputation, in this case about the entitlement of DVR to deduct from wages costs such as board and lodgings, airfares and visa costs.

[17] Next, I need to consider the time records, or more accurately the dispute about time recording.

[18] Finally, I need to deal with the incidence of income tax.

[19] The question of the continued presence of the crew on the vessel after the conclusion of the work covered by their employment agreement was resolved in a mediation presided over by Mr Ian McAndrew at Dunedin on 2 December 2006. Once that matter had been satisfactorily resolved, the issue of the crew's continued presence on the vessel no longer formed part of the subject matter of the dispute and so did not fall to the Authority for determination. The resolution of matters in this way enabled the majority of the crew to be repatriated to their home country without prejudice to their rights and interests in the present proceeding and also allowed DVR to re-crew its vessel and return it to sea. Two members of the crew remain in New Zealand awaiting the issue of this determination.

[20] At that mediation on 2 December 2006, as well as resolving the issue of the entitlement of the crew to remain on board the vessel at the end of their engagement, the parties agreed on a number of matters as being *for determination by the Employment Relations Authority*.

[21] For the avoidance of doubt I set out now those matters in full:

> *(a) Which contract(s) and what terms of employment govern the employment relationship between the Employer and the Crew Members.*
>
> *(b) The date of termination of the Crew Members' employment by the Employer.*
>
> *(c) Whether the Employer is entitled to make deductions from the wages of Crew Members generally; but specifically for:*
>
> *(i) airfares for the repatriation of Crew Members;*
>
> *(ii) food and lodging;*
>
> *(d) Whether the Employer was authorised to make cash advances on behalf of the crew which were applied to the payment of agent's fees;*
>
> *(e) Any dispute over the quantum of airfares or over the different rates at which airfares are deducted for Crew Members or over the provision of additional internal flights within the Ukraine, subject to the Authority's Determination in (c) above in relation to airfares;*
>
> *(f) Any other matters arising from the employment relationship between the Employer and the Crew Members as determined by the Employment Relations Authority.*

And finally:

> *Whether the Employer is entitled to recover the cost of housing the Representatives in Wellington is to be determined by the Employment Relations Authority.*

[22] The effect of these provisions is to create a further, somewhat overlapping, set of issues for the Authority to resolve and this in circumstances where, in some cases anyway, the evidence heard at the investigation meeting did not adequately deal with the issue. Pressure to issue a determination by a particular date to enable the crew representatives to return home and the fact that other witnesses have already left the jurisdiction make the issue ever more challenging.

### ***Background***

[23] Both the parties to this employment dispute are in effect foreign nationals and for the purposes of this determination, it is appropriate to briefly sketch the basis on which the jurisdiction of the New Zealand Employment Relations Authority comes about. The essence of that, of course, is that, notwithstanding issues of nationality, these employees were performing work for this employer within the jurisdiction of New Zealand by virtue of the New Zealand Exclusive Economic Zone (*EEZ*).

[24] The New Zealand government, through the Department of Labour, grants an Approval in Principle to Recruit Foreign Workers (*AIP*). In addition, a Code of Practice (*COP*) sets out the New Zealand government's requirements in respect of the treatment of foreign fishers and, amongst other things, stipulates working hours, deductions and other traditional requirements of the employment of fishers in the New Zealand fishing industry. Both the owner of the foreign fishing vessel (in this case DVR) and the New Zealand charterer of the vessel (not a party in the present proceedings) must accept the stipulations set out in the COP before the New Zealand government will grant the relevant AIP.

[25] Section 103(5) of the Fisheries Act 1996 imposes on DVR and the vessel the effect of two New Zealand employment statutes, namely the Minimum Wage Act 1983 and the Wages Protection Act 1983.

[26] Critically for our purposes, the subsection goes on to provide at subsection (g) as follows:

> *The Employment Relations Authority and the Employment Court may exercise jurisdiction in respect of any employment relationship that arises by virtue of paragraph (a) or paragraph (b) of this subsection as if it were a lawful employment relationship subject to New Zealand law.*

[27] Paragraphs (a) and (b) are the paragraphs imposing the general requirement for the application of the Minimum Wage Act 1983 and the Wages Protection Act 1983.

[28] It is clear from the foregoing provision that the Employment Relations Authority has jurisdiction to deal with the wages issues before it and by implication, I hold that the Authority also has jurisdiction to deal with the claim made by the crew that the employment agreement dated 10 May 2006 may also be the subject of consideration by the Authority to the extent required to deal with the crew's claims in relation to the Minimum Wage Act and/or the Wages Protection Act.

[29] One final matter needs to be dealt with under this head. The Code of Practice on Foreign Fishing Crew dated 19 October 2006 which was provided to the Authority at the investigation meeting and which it seems the parties relied upon in initially referring the dispute to mediation on 20 November 2006 and again on 27 November 2006 is, I find, **not** the applicable code of practice.

[30] The applicable code of practice is an earlier document which is expressed to remain in force until 30 July 2006. The relevant provision in the COP then goes on to state as follows:

> *The COP will be reviewed in July each year, with the intention of having a revised version agreed, signed and in effect for the beginning of each Term ie by October 1st each year. If necessary and with the agreement of all parties, the COP can be revised and amended within the Term. The Department and SeaFIC* [a reference to the New Zealand Seafood Industry Council] *will liaise to arrange this.*

[31] It is clear then that this earlier COP was the relevant document when the AIP was granted on 27 January 2006.

The significance of the difference in the two codes of practice is that the earlier code of practice document, to which I have just referred and which I have found was in fact the applicable code of practice for this employment relationship, did not have the dispute resolution provisions which both parties, no doubt acting in good faith, relied upon to convene the mediations on 20 November and 27 November 2006. However, given that those mediations and the subsequent successful mediation on 2 December 2006 were entered into voluntarily and in good faith, I find that nothing turns on that.

***The deductions***

[32] A meeting at Sebastopol is important because this was the first occasion that the parties met and discussed the nature and terms of the employment relationship in anticipation of the vessel being on the New Zealand coast. The meeting took place on 10 May 2006 and involved the captain of the vessel, a representative of DVR and the crew who would work the vessel while she was in New Zealand waters.

[33] There are two views, on the evidence, about the Sebastopol meeting. DVR says that the crew were briefed on *the terms of their engagement* and that this briefing included the captain going through the collective employment agreement which would apply. It is common ground that the captain was *speaking to* the employment agreement document and describing it for the crew. It is accepted that the crew did not see the document and that the crew each executed a schedule (a copy of which was put into evidence) which authorised the captain to sign the employment agreement on behalf of the crew.

[34] In his written statement translated for these proceedings, Mr R L Gulin, the deputy general director of DVR, described the process by which the information was to be disseminated at the 10 May 2006 meeting with the crew. Mr Gulin says that he emailed the crewing company (whose role it was to provide a crew for the vessel) and provided information on the arrangements for the forthcoming voyage. In particular, he has this to say:

> *I emphasised that during the recruitment process the company was to ensure that each crew member was aware of the contents of the contract.*

[35] Mr Gulin then goes on to say that he subsequently met with the vessel's captain, Captain Polishchuk, and he says that he discussed *all clauses* of the contract and *… I asked him to inform the crew, one more time, of the contents of the contract at pre-departure meeting in Sebastopol in May 2006*.

[36] Captain Polishchuk, who gave evidence on oath at the investigation meeting, states that during the pre-departure crew meeting (the 10 May 2006 meeting), *… I informed the crew of the contents of the collective contract No 2 (the applicable collective contract) and in particular of sections related to wages, possible deductions, disciplinary penalties as well as ship owners' and crew's responsibilities. There were no questions or comments regarding the collective contract*.

[37] In giving his oral evidence at the investigation meeting, Captain Polishchuk said that he had no authority to *comment* on the employment contract and that he did not do so. All he says he did was describe the actual terms of the agreement. He said that he thought that deductions had been a subject that had been talked about in Sebastopol but that all that he had done was to refer to the actual words in the contract as that was *all he was empowered to do*.

[38] The view advanced by the crew is quite different in material respects. A representative of the crew gave evidence at the investigation meeting in Dunedin through an interpreter. In giving his evidence, he referred extensively to typed notes which appeared to me to be in Russian script. I sought and obtained a translation of those notes.

[39] Those notes, together with the oral testimony of the crew's representative, Mr Ruslan Orlenko, paint a very different picture of the Sebastopol meeting. The crew's evidence is that no employment agreement was presented for signature but that the crew were shown two sheets of paper and told that these two sheets of paper would form the basis for an employment agreement which would be available later. The signatures of the crew were collected on separate sheets of paper and the crew says they were told that a full employment agreement would be provided on their arrival in New Zealand. This is completely different from the captain's testimony; the captain says that he talked to the terms of the actual agreement and that he left a copy of the agreement on the vessel in the crew's mess room for them to consult.

[40] The crew say that at the Sebastopol meeting, they understood that airfares to New Zealand, accommodation, meals, procurement of visas and medical insurance were all undertaken by the owner of the vessel and not the subject of deductions from their wages as the employment agreement actually provides for. This is one of the key disputes between the parties.

[41] It is important to note, for the sake of completeness, that the common position in voyages of this kind is that there is provision for deductions from the wages of the crew for the cost of airfares, board and lodging and visa costs. It follows that the crew's understanding on this matter appears different from the usual approach. Mr Orlenko was very clear in his oral evidence that the crew understood that these costs were borne by the vessel owner and not recovered from the crew.

[42] Part of the explanation for why the crew formed the view that they did may be found in the oral evidence I heard from Mr Orlenko to the effect that some of his compatriots on the vessel had served on these kinds of voyages as many as eight times previously and that those crew members who had had that level of experience told their comrades not to worry because the deductions were never made. I was very careful to question Mr Orlenko on this point and he was adamant that that was the experience of those older hands. While this evidence is hearsay, of course, it may help explain why the crew were so adamant about their position assuming it to be accurate.

[43] Further, Mr Orlenko, in his oral evidence, said that the contractual provision relating to deductions had been commented on by the captain when the matter was discussed at Sebastopol and that the captain had said that the deductions provisions only applied where the crew member did not comply with the terms of the contract.

[44] In his oral evidence, Captain Polishchuk absolutely denied saying any such thing and reiterated that he had no authority to comment on the contract and did not do so. He simply did his best to *explain its terms*.

[45] On this vexed subject of the deductions, it is interesting to note the actual words in the contract. The relevant provision in the New Zealand translation is clause 6.3 and it reads as follows:

> *When calculating the crew member's remuneration, the ship owner shall be governed by the New Zealand Minimal* (sic) *Wage Act of 1983. The ship owner retains his right to deduct from the crew member's wages expenses related to:*
>
> - *transportation of a crew member from Sebastopol to New Zealand and return*
> - *daily allowances to crew members during their travel to and from the vessel at US$7*

- *crew members' meals while on board the vessel at NZ$9*
- *crew members' lodging at the rate of not more than NZ$10 …*

[46] It is clear from the foregoing provision that the drafter of the contract sought to give the ship owner an option to deduct sums from the crew's wages. This is clear from the use of the words *… retains his right to deduct ….*

[47] It seems to me to follow that the ship owner, DVR, has a discretion and wishes to have a discretion in relation to deductions from the crew's wages. For their part, the crew were absolutely adamant that at the Sebastopol meeting they were told that deductions would not be taken from their wages or that deductions would only apply in the event of wrongdoing by an individual crew member. Again, that may to be consistent with the way in which the particular provision is couched.

[48] Those views which the crew were forming from their initial briefing in the Sebastopol meeting would have been encouraged no doubt on the subject of the deductions issue by the opinions advanced by their more experienced brethren who were very clear that the deductions *were never made*.

[49] I need to consider now the effect of s.5 of the Wages Protection Act. Broadly speaking, that section requires an employer to obtain a worker's written consent before deductions from wages can be made. The section goes on to provide, in similar terms, for the situation where a variation or withdrawal of that right is required.

[50] Not surprisingly, DVR submits that, by *entering into* the collective employment agreement, the crew consented in writing to those deductions being made. I do not accept that submission. I think the law on this point is otherwise. The provision in the statute is designed to protect workers from abuse and the decided cases clearly require explicit informed consent rather than what amounts to consent by default as in this case.

[51] In my opinion, it would be necessary for DVR to obtain formal explicit consent to the deductions being made and to the quantum of the deductions in contemplation before those deductions will be held legal at law in New Zealand.

[52] I am particularly impelled to this view by the somewhat informal way in which the contract of employment was executed by the crew and by the wording of the relevant contractual provision which, as I have already emphasised, only conveys an option on the employer.

[53] In referring to the method of execution of the employment agreement, I am referring to the practice adopted apparently commonly in employment agreements of this kind and type where the crew are asked to execute a schedule the effect of which is that they, by doing so, authorise the captain to then enter into the employment agreement on their behalf. This strikes me as a form of execution by what amounts to remote control and, in those circumstances, makes it even less likely I think that such arrangements could be seen as complying with the requirements of s.5 of the Wages Protection Act 1983.

[54] I do not think the arrangement is saved by the effect of s.16 of the Wages Protection Act which provides, inter alia, that nothing in the Wages Protection Act makes it unlawful to comply with any provision in a collective employment agreement *… within the meaning of the Employment Relations Act 2000 …*. It is plain that the collective employment agreement in this case is not a collective agreement in terms of the Employment Relations Act 2000; that last mentioned statute has limited force or effect in respect of the subject collective employment agreement: s.103(5) Fisheries Act 1996; the agreement was executed overseas by overseas parties and on general legal principles would presumably be subject to the laws of Russia; the agreement itself provides that disputes are to be resolved by reference to the International Court in The Hague.

[55] It follows that I do not consider that, on the balance of probabilities, the particular form of execution of the collective employment agreement constitutes the kind of *informed consent* which I consider s.5 of the Wages Protection Act requires. To the extent then that deductions rely exclusively on the simple informal execution of the collective agreement, I find that those deductions may not be made from the crew's wages.

[56] The position is otherwise where there is separate documentation which constitutes that written consent of the worker. I am satisfied that this is the situation in respect of at least some of the wage advances made to crew members by DVR.

***Time records***

[57] At the point at which this matter came before the Authority, the span of hours that the crew were to be paid for and the record keeping to justify those payments were both in issue.

[58] As a consequence of the various exchanges between the parties, both during the investigation meeting proper, in the mediation I directed the parties to attend on 2 December 2006, and in the subsequent contact between them, there has been an agreement reached between the parties on the principles that ought to apply in respect of the payment of wages.

[59] I am satisfied that the arrangements that the parties have tentatively agreed between themselves are in accordance with the relevant law and accordingly I will make orders confirming the agreements that the parties have already reached provisionally.

[60] The only other matter that I need to comment on under this head is the question of the entitlement of the crew to remuneration based on a percentage of the catch. As is traditional in these kinds of fishing operations, the crew have an entitlement to enjoy a percentage of the catch as part of their remuneration. The usual split is that the owner gets 85% and the crew receive 15%. The crew's share of the catch is simply sold with the owner's share and the owner is under an obligation to account to the crew for the proceeds.

[61] Those arrangements, broadly speaking, applied in relation to this particular voyage but the reality was that the fishing was so unsuccessful that the total catch for the crew's period of service was significantly down on the catch that was predicted.

[62] In those circumstances, the agreement between the parties very clearly provides that because the crew share was less than the New Zealand minimum wage for the relevant period, the minimum wage was to apply.

[63] Had the crew's share of the catch exceeded the calculation of the New Zealand minimum wage for the crew, then the excess was to be paid to the crew as a bonus.

[64] That not being the case, the provisions in the agreement between the parties very clearly stipulate that the crew's entitlement to a share of the catch does not factor into the wage calculations.

***Income tax***

[65] During the investigation meeting, one of the issues that the crew raised as being of concern to them was the incidence of income tax. The crew are Ukrainian and the vessel is Russian and the question of, in particular, double-taxation applied.

[66] DVR argued very strongly that, notwithstanding there was an issue about the incidence of income tax, it was not competent for the Authority to attempt to deal with the matter for want of jurisdiction.

[67] I had indicated informally to the parties that, if it was of assistance to them, I would arrange to obtain a tax opinion from a reputable international chartered accountant practice

operating in New Zealand and make that opinion available to the parties in conjunction with the issuance of my determination.

[68] That offer did not prosper in the discussion between the parties and in the result they have taken their own advice on the matter. I agree with the submissions of DVR that it is not competent for the Authority to make pronouncements about the tax position in foreign jurisdictions. The limitations on the Authority's involvement in the instant matter have already been the subject of analysis in this determination. Matters that fall outside the scope of the Authority's ambit would, on general principles, presumably be dealt with in accordance with Russian law, the vessel being a Russian-flagged ship. In the event this were a matter that required determination by a Court of competent jurisdiction, the employment agreement requires reference to the International Court in The Hague. One may wonder at the practicality of that provision from the crew's perspective, but that wonderment does not extend to creating a jurisdiction for the Authority which did not previously exist.

***Determination***

[69] The consideration of this dispute has been a complex and difficult exercise for all parties, the Authority included. There has been confusion about the applicable documentation.

[70] There has been confusion about the nature and extent of the issues troubling the crew to the extent that DVR contends, with some justification, that the crew changed their position during the dispute, particularly in relation to just what it was that was of concern to them.

[71] Part of the crew's difficulty was, it seems, a distrust of DVR and indeed many of the people and institutions that they came into contact with. Reading a translation of the crew's evidence and hearing their oral testimony certainly conveyed that strong impression.

[72] Because the crew and virtually all the other witnesses that appeared in the investigation meeting were giving their evidence in a foreign tongue, and many of the relevant documents were, of necessity, translated from their original Russian to English, there is a real sense in which it can be said with some justice that many things may have got lost in translation. Having made that observation, I certainly do not want to be seen as casting any doubt on the integrity or ability of any of the translators or interpreters who assisted either of the parties, or indeed the Authority, in understanding either the oral or the written evidence. It is nonetheless a fact that the need to hear evidence from another language and have it translated into one's own language poses its own difficulties.

[73] It is also appropriate of me to draw attention to the fact that, for whatever reason, these parties do not seem to have had a satisfactory working relationship. From the very commencement of their interactions in Sebastopol, there seems to have been a profound level of suspicion developed.

[74] There were a succession of meetings between the crew and DVR during the course of the employment relationship. The first happened while the vessel was alongside at Port Lyttelton before she commenced fishing operations (that is sometime between 18 June, when the crew arrived, and 13 August, when the vessel eventually put to sea). During this meeting, the crew says that notwithstanding their strong belief that the captain was, to use Mr Orlenko's words, *a defender of the rights of the crew*, the captain told them, in relation to their concerns about remuneration,that *everyone stands alone*. If this exchange happened in the way the crew recall it, it is not difficult to understand their distress, given that the captain was, aside from anything else, their agent in the execution of the employment agreement.

[75] On 13 September, there was another meeting between the crew and DVR at Port Lyttelton. The crew were still concerned about their remuneration and that concern had not been allayed by the delay in the vessel's sailing to the fishing grounds. The crew says that at this meeting DVR's representative, Valary Botik, told them that most of their pay would come from the catch but that gave the crew little comfort, according to the evidence, because the vessel had by that stage spent so little time fishing. The crew's evidence was that they were

treated *very abruptly* by Mr Botik and they were told that *they would receive what they would receive*.

[76] Next there was the disagreement between the parties at Port Nelson on 28 October at which again the issue of how much the crew was to receive by way of payment was discussed and issues such as the relationship between the fish catch and the base hourly rate payment and the question of deductions were canvassed again. An agreement was drafted as a consequence of the discussions between the parties in Nelson and that agreement the crew seeks to rely upon when they again raised their concerns at Port Dunedin a month later. Critically in my view, the Nelson agreement does not at any point mention deductions from the crew's wages except deductions as a consequence of cash advances being made.

[77] When the voyage was due to conclude on 18 November 2006 at Port Dunedin, the crew again raised the issue of their remuneration and, as I have already described, refused to leave the vessel in order to be repatriated.

[78] That refusal resulted in DVR acting on the COP dated 19 October 2006 and seeking the assistance of the Mediation Service of the Department of Labour on 20 November 2006 and again on 27 November 2006. The matter was then referred urgently to the Authority and the parties then returned to mediation and mediation on 2 December 2006 resulted in an agreement for the crew to leave the vessel and also resulted in the parties in effect reformatting the issues that were still outstanding.

[79] Rather than approach matters on the basis of that reformatting, I have thought it more appropriate and more in accordance with the Authority's practice and procedure to deal with the matter in terms of the statement of problem originally filed and this determination has proceeded on that basis. Were it otherwise, the Authority would be endeavouring to answer questions posed by the parties when in effect the investigation meeting and the evidence (such as it is) was advanced on a slightly different basis.

***Decision***

[80] I have reached the conclusion that, with the exception of the cash advances where there was a proper written authorisation from the crew members concerned to repay money already provided to them by DVR, the deductions applied do not in my opinion conform to the law of New Zealand and it follows that those deductions cannot be applied against the amounts due to the individual crew members.

[81] A particular subset of the issue just stated concerns DVR's right to recover the cost of housing the representatives of the crew in Wellington while they await the decision of the Authority. I hold that the employment relationship for the representatives has now concluded and accordingly the rule referred to in the preceding paragraph does not apply. It follows that as the matter is not within the ambit of the Authority's jurisdiction, I am not able to determine the issue. The parties will need to address this issue themselves.

[82] On the question of the wages due and owing to the crew, I am satisfied that the parties have themselves resolved that issue and the terms of their agreement are the order of the Authority. The effect of the parties' agreement is that hours of work are to be calculated for crew members on the basis of 10 hours per day for that part of the voyage from 18 June 2006 until 27 October 2006, both dates inclusive; and crew members worked the actual hours are recorded from and including 28 October 2006 until 18 November 2006 which I determine is the last day of the crew's employment.

[83] The Authority was asked to decide the question of the applicable employment agreement. With the passage of time, my sense is that that issue no longer separates the parties and that each now accepts that the document styled *Collective Contract No 2 of Joint Operations* and dated 10 May 2006 is in fact the employment agreement applying to the employment relationship between these two parties. For the avoidance of doubt, I now hold that that document is in truth the employment agreement covering the employment relationship between the two parties to this dispute.

[84] The representatives of the parties are encouraged to resolve between them the application of the decisions made in this determination. Leave is reserved for the parties to revert to the Authority in respect to matters of detail should that be necessary.

***Costs***

[85] The applicant, DVR, seeks costs against the crew alleging that the crew's behaviour at the end of the engagement from 18 November 2006 onward put the employer, DVR, to considerable cost which it is entitled to recover. These additional costs are estimated by DVR at NZ$100,000. In addition, DVR, on the evidence available to the Authority, made a significant loss on this particular voyage of over NZ$600,000.

[86] Of course, costs normally follow the event and in this particular situation, notwithstanding the additional costs which I accept DVR has incurred on and from 18 November 2006, the result of the application to the Authority primarily favours the crew rather than DVR.

[87] It follows that if there were to be any costs award at all, it would be in favour of the crew.

[88] However, having weighed all of the factors in this particular situation, I do not think this is a matter where there should be a costs award and I consider the appropriate stance for the Authority to take is to order that costs are to lie where they fall.

James Crichton
Member of Employment Relations Authority