IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 148
5453965

	BETWEEN	NEW ZEALAND FISHING INDUSTRY GUILD INCORPORATED Applicant
	A N D	SEALORD GROUP LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Anjela Sharma, Counsel for the Applicant Peter Kiely & Mere King, Counsel for the Respondent
Investigation Meeting:	12 and 13 May; 16 and 17 June; 27 August 2015 at Nelson
Submissions Received:	11 September and 2 October 2015 from the Applicant 25 September 2015 from the Respondent
Date of Determination:	8 October 2015

DETERMINATION OF THE AUTHORITY

A. **The respondent did not breach the terms of the 2012-13 Fishers' Agreement or its statutory duties in the way that it increased the respective catch plans of the vessels in respect of which the Authority heard evidence.**

B. **Skippers do not fall within the definition of *crew* in the coverage clause of the 2012-13 Fishers' Agreement.**

C. **Costs are reserved.**

Employment relationship problem

[1] The nature and scope of the applicant's claims have evolved over the course of time, from the lodging of the first (unamended) statement of problem to the conclusion of the substantive investigation meeting and the lodging of submissions. However, the respondent has sensibly not protested this evolution in an obstructive manner, and this determination addresses the applicant's case as it stood at the stage of counsel's submissions.

[2] The applicant (the Guild) claims that the terms of its 2012-13 collective employment agreement with the respondent, called the Fishers' Agreement, have been breached by the respondent failing to comply with its obligation to consult meaningfully with the skippers of its fishing vessels when it changed the catch plans of a number of fishing vessels in 2013. The Guild states that, as a result of the breach, its members suffered significant losses by way of lower bonus payments to them in the 2013/14 fishing year.

[3] The Guild also asserts that the respondent unlawfully decreased the bonus rates of its members, in breach of contract.

[4] The applicant also claims that the respondent has breached its duty of good faith under the Employment Relations Act 2000 (the Act) in the way that it increased catch plans without meaningful consultation with skippers. It also claims that there was a breach of the duty of good faith in that the respondent failed to consult with crew members about its decision to *align catch plans with catch pay plans.*

[5] A separate and final issue that the Authority has been asked to determine is whether skippers fall within the coverage clause of the 2012-13 Fishers' Agreement.

[6] The respondent denies that it has breached the terms of the 2012-13 Fishers' Agreement and/or any other agreement with the Guild's members, and also denies that it has breached its duty of good faith towards the Guild and its members. It asserts that it carried out a full consultation with the skippers of each affected vessel in accordance with its obligations and that it did not have any obligation to consult with the crew members.

[7] Sealord also asserts that skippers are not covered by the terms of the Fishers' Agreement.

[8] The Authority's investigation has been spread over three sets of meetings in order to accommodate the different shifts of the skippers and crew members who gave evidence.

Brief account of events leading to the dispute

[9] Sealord operates a number of fishing vessels and employs a number of fishers under the terms of the 2012-13 Fishers' Agreement. It also employs a number of skippers, the majority of whom have signed individual employment agreements.

[10] The most recent Fishers' Agreement in force between the Guild and the respondent expressly covered the period 6 July 2012 to 30 September 2013. As the Guild initiated bargaining before the Fishers' Agreement expired, with the purpose of replacing it, the terms of the Fishers' Agreement continued in force for a further 12 months until 30 September 2014, pursuant to the terms of s.53 of the Act.

[11] Thereafter, as the parties have not been able to conclude bargaining, pursuant to s.61 of the Act the members of the Guild have continued to be employed under individual employment agreements based on the Fishers' Agreement, and any additional terms and conditions agreed between the Guild members and the respondent, which are not inconsistent with the terms of the Fishers' Agreement.

[12] The 2012-13 Fishers' Agreement contains the following material clauses:

> *Parties*
> *1.1 The parties to this collective agreement are:*
>
> - *Sealord Group Limited ("Sealord" or the "Company").*
> - *The New Zealand Fishing Industry Guild Incorporated, a union duly registered under the Employment Relations Act 2000 ("the Union" or "the "Guild").*
>
> *Coverage*
> *1.2 This agreement covers all Guild members who are employed by Sealord as crew on the FV Independent 1, Ocean Dawn, Thomas Harrison, Otakou, and Rehua, and such other vessels as agreed from time to time between the General Secretary of the Union and the Chief Executive of the Company.*
>
> ***2 NATURE OF AGREEMENT***
>
> *2.1 The nature of Sealord's business requires flexibility in its operations in order to meet customer needs in the most efficient way.*

The parties to this agreement recognise and support the need for flexibility and it is agreed that necessary or desirable changes in terms and conditions of employment will be carried out as far as possible through a process of consultation with fishers directly affected.

…

3. DUTIES

3.1 The work covered by this agreement includes the following duties on any of the vessels listed in clause 1.2:

- *Any fishing activities carried out, by whatever method.*
- *Any net mending or any other maintenance as required by the master of the vessel or any officer with delegated authority.*
- *Transfers from one vessel to another at sea of any catch, whether processed or not.*
- *Any processing of fish on a vessel.*
- *The unloading of any fish from a vessel.*
- *Duties associated with survey and research requirements.*
- *Any other activities associated with fishing vessel operations as may be directed by the master, the fleet managers or any officer with delegated authority.*
- *Any travel or accommodation provided by the Company while travelling to or from the port of domicile or waiting for a vessel to sail.*
- *When fishing in waters other than the New Zealand Economic Zone, fishers who are already covered by this agreement will continue to be covered by it unless otherwise specified.*
- *Training during trips off.*
- *Time during trips off also constitutes time worked for the purpose of this agreement. Such days would otherwise be working days for the fisher and the parties have agreed that the trip off periods provide paid time off for the observance of annual holidays, public holidays, alternative holidays and all other forms of leave entitlement (refer clause 7.3).*

3.2 The master and fishers will operate the vessel to fish where and as directed by Sealord and process the catch to Sealord specifications.

3.3 The masters and fishers agree not to take any action that would cause fish caught and on board to be wasted; and recognise the need to conserve fish stocks in accordance with the provisions of the Fisheries Act and Regulations, Industry Codes of Practice, any other relevant legislation and Company policies on quota management to ensure the sustainability of the resource and the future security of the Company.

3.4 Fishers may not work for any other fishing companies in any capacity (including contracts for services) while employed by

Sealord, except with the prior written consent of their vessel manager or vessel master.

…

6. REMUNERATION

6.1 Payment for permanent fishers will be based on a catch plan determined annually (or for some other agreed period) by Sealord in consultation with the master of the vessel. The catch plan for each vessel will be made available to the vessel's crew prior to 1 October each year. Sealord may change the catch plan, but in the event of a catch plan change Sealord will provide at least one (1) trips' [sic] *notice in writing before the revised catch plan is implemented.*

6.2 Each fisher's personal remuneration is based on an annual Budgeted Catch Payment, comprising a Retainer Payment and a Catch Bonus.

6.3 The Retainer Payment is set at fifty (50) percent of the fisher's Budgeted Catch Payment in the case of fresher vessels and seventy (70) percent of the fisher's Budgeted Catch Payment in the case of freezer vessels. In either case, subject to any other provision of this agreement, the Retainer Payment is paid in equal fortnightly amounts.

6.4 The Catch Bonus will vary depending on the quantity and quality of fish landed at the end of each voyage. The tonnage subject to the Catch Bonus calculation will be the nominal weight rather than the actual weight. The frequency of Catch Bonus payments is dependent on when the catch is landed and evaluated; and is also subject to any other provision of this agreement. Where a vessel berths more than 7 days before the end of a pay period the catch bonus will usually be paid in the next pay following the landing and evaluation of the catch, but where a vessel berths 7 or fewer days before the end of a pay period the bonus will usually be paid in the following pay. In some cases the bonus may be estimated with an adjustment, up or down, to be made in the following pay period. If annual targets are exceeded the Catch Bonus provides an opportunity to increase the fisher's annual remuneration beyond his/her Budgeted Catch Payment figure. Similarly, if the vessel does not achieve its annual targets then the Catch Bonus would reduce the fisher's annual remuneration to below his/her Budgeted Catch Payment figure.

6.5 All fish landed will be subject to Sealord's dockside grading system. Any fish that are considered to be in a condition unfit for processing will not be considered for catch bonus. Any such fish will be made available for inspection by the master or his/her deputy at the earliest opportunity after the rejection of the fish; and within 24 hours of unloading. The master has a right to inspect all records relating to the landing and the weighing of the catch.

…

28. PAY INCREASE

…

28.3 In respect of the rights and obligations of the parties and the term of this agreement, this agreement supersedes and replaces any individual employment agreement made between a fisher covered by this agreement and Sealord, prior to the date of ratification of this agreement. Following ratification, Sealord will issue a new appointment letter to every fisher bound by this collective agreement,

> *to confirm his/her personal rate of remuneration and other terms of employment that are not inconsistent with this collective agreement.*

[13] The Authority heard evidence from skippers and crew of fishing vessels *Rehua*, *Otakou*, *Ocean Dawn* and *Thomas Harrison* and from one crew member of the *Aukaha.* It also heard from the former Guild Secretary Bob McAlister and, for the respondent, from Fleet Harvest Managers William Healey and Scott Gillanders, and Doug Paulin, General Manager of Fishing at Sealord Group Limited.

The issues

[14] The Authority must determine the following issues:

a. Was there a failure to consult meaningfully with skippers in respect of changes to the catch plans of their respective fishing vessels in the 2013/14 fishing year, in breach of the respondent's contractual and statutory obligations?

b. Was there a contractual or statutory duty to consult with skippers and crew members about the decision to align catch plans with catch pay plans?

c. If there was such a duty, did the respondent fail to do so?

d. Was there a contractual or statutory duty to consult with skippers and/or crew members about the effect increases in catch plans would have on the bonus rate?

e. If so, was there a breach of such a duty?

f. Are skippers covered by the terms of the 2012 to 2013 Fishers' Agreement?

Was there a failure to consult meaningfully with skippers in respect of changes to their respective fishing vessels in the 2013/14 fishing year, in breach of the respondent's contractual and statutory obligations?

[15] In order to examine whether there has been a failure to consult in accordance with clause 6.1 of the Fishers' Agreement and s. 4 of the Act, it is necessary to examine what happened in respect of each fishing vessel for which witnesses gave

evidence. First, however, it is helpful to explain briefly what a catch plan is and how it impacts upon the bonus payments of crew and skippers.

The catch plan and how it impacts on bonus payments

[16] Put simply, prior to the start of each fishing year (which runs from 1 October to 30 September) Sealord assesses what it believes each vessel is capable of achieving in terms of weight of fish caught and/or processed (known as the catch plan). This is assessed in terms of green weight tonnage (GWT) for unprocessed fish and product weight tonnage (PWT) for fish that are processed in various ways. The respondent's witnesses gave evidence that there are a significant number of factors that affect the assessed catch plan, including the allowable catch entitlement as set by the Ministry of Primary Industries, the catching and processing capability of each vessel, the maintenance plans for each vessel, customer sales requirements and skipper and crew capabilities, amongst other things.

[17] Once the catch plan for a particular vessel is determined, it is made known to the crew as it impacts directly upon the crew's ability to achieve and exceed the bonus element of their Budgeted Catch Payment.

[18] By way of example, the Authority saw the pay details for one of the senior crew of the fishing vessel *Rehua*[1]. From 1 July 2012 he was entitled to an annual package of $136,935 based on a catch plan of 3,500 PWT. The bonus element of that annual package (referred to as the Budgeted Catch Payment in the Fishers' Agreement) amounted to $41,080.50. That bonus element divided by 3,500 PWT resulted in a bonus rate per tonne of $11.74. The bonus payment is paid out in accordance with the catch after each trip. If the *Rehua* caught and processed more than 3,500 PWT during its fishing year, then this crew member would receive a bonus payment in excess of $41,080.50, calculated at $11.74 per additional PWT. This process of exceeding one's catch plan, and receiving additional bonus payments above the annual package, is referred to as *over catching*. Many of the witnesses for the applicant said that over catching was a fundamental contractual right.

[19] In 2013 Sealord proposed to change the catch plan for the *Rehua* significantly, from 3,500 PWT to 4,932 PWT. Although the crew members' Budgeted Catch Payment had increased to $137,962, of which $41,386 comprised the 30% bonus

[1] I do not name him in order to keep his personal pay information confidential.

portion, as the catch plan tonnage was to increase so significantly, it resulted in the bonus rate per tonne reducing to $8.39.

[20] It was the evidence of the skippers and the crew of fishing vessels who were represented by the witnesses, that increases to the catch plans of the fishing vessels in question in 2013 had two effects:

a. Their ability to over catch was reduced, because the threshold above which over catching was possible had been increased; and

b. The dollar rate at which the bonus was paid was decreased.

[21] I set out briefly the applicable legal principles to be applied when assessing whether the communications between Sealord and the skippers about changes to the catch plans amounted to meaningful consultation.

Applicable legal principles

[22] Section 4(4)(c) of the Act provides that the duty of good faith in subsection (1) applies to consultation (whether or not under a collective agreement) between an employer and its employee, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business. I am satisfied that this duty applies to Sealord wishing to change the respective catch plans of its vessels.

[23] In the Court of Appeal case of *Auckland City Council v. New Zealand Public Service Association Inc*[2] the Court of Appeal held, at [24] as follows:

> *There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when that still realistically can influence outcomes. To adopt an approach calling for a mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind. Similarly the issue in question may affect the nature and timing of the provision of information and consultation. Redundancy of particular positions presents different issues than does the formulation of business plans.*

2 [2004] 2 NZLR 10, [2003] 2 ERNZ 236

[24] In *Communication and Energy Workers' Union Inc v. Telecom New Zealand Ltd*[3] the Employment Court inquired into what is meant by *consultation* and referred to the judgment of the Court of Appeal in *Wellington International Airport Ltd v. Air New Zealand Ltd*[4]. In the Employment Court case Chief Judge Goddard extracted the following propositions in relation to what is meant by *consultation*, at [455]:

> *From the three pages devoted to consultation in the judgment of the Court of Appeal*[5]*, I extract the following propositions which can now be taken to enjoy the approval of that Court:*
> *(1) The word "consultation" does not require that there be agreement.*
> *(2) On the other hand it clearly requires more than mere prior notification.*
> *(3) If there is a proposal to make a change, and such change requires to be preceded by consultation, it must not be made until after consultation with those required to be consulted. They "must know what is proposed before they can be expected to give their views" (see Port Louis Corp).*
> *(4) This does not involve a right to demand assurances but there must be sufficiently precise information given to enable the person to be consulted to state a view together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*
> *(5) The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties: "they must be free to say what they think" (see Port Louis Corp).*
> *(6) Consultation must be allowed sufficient time (McGechan J).*
> *(7) Genuine effort must be made to accommodate the views of those being consulted; consultation is to be a reality, not a charade (McGechan J).*
> *(8) Consultation does not necessarily involve negotiation towards an agreement although this not uncommonly can follow as the tendency in consultation is to seek at least consensus (McGechan J).*
> *(9) Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done (McGechan J).*
> *(10) The party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh (McGechan J).*
> *(11) There are no universal requirements as to form or as to duration of consultation.*
> *(12) Consultation cannot be equated with negotiation in the sense of a process which has, as its object, arriving at agreement.*

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3 [1993] 2 ERNZ 429
4 [1993] 1 NZLR 671 (CA)
5 *Wellington International Airport Ltd v. Air New Zealand Ltd* [1993] 1 NZLR 671 (CA).

Fishing vessel Rehua

[25] Evidence was heard from the two skippers of the *Rehua*, Mr Peter Connolly, and Mr Tom Jackman, as well as its bosun, its two chief engineers, a first factory engineer and a factory senior. Evidence was also heard from Mr Gillanders, the fleet harvest manager responsible for the *Rehua,* and from Mr Paulin.

[26] A few words should be first said about the *Rehua*'s catch history, as it is relevant to the issues that have given rise to much of the discontent of the Guild. For many years, the *Rehua* had a catch plan of 3,500 tonnes. It is understood that this was first set because of fishing quota limitations. However, quotas were then relaxed, and the *Rehua* started to catch significantly more than 3,500 tonnes annually. However, the official catch plan of 3,500 tonnes was never changed before 2013. Hence, the skippers and crew enjoyed considerable over catching, and as a consequence, significant bonus payments, for a number of years up to 2013. Mr Paulin estimated the over-catch rate at around 42% annually, as compared to much more modest over catch rates for many other vessels. For this reason, the respondent has referred to the *Rehua* as an *outlier*[6].

[27] It was Mr Connolly's evidence that the changes made to the catch plan for the *Rehua* in 2013 were unilaterally made by the respondent and that there was no meaningful consultation. His evidence is that he was on the bridge of the *Rehua* when a call came through to him from Mr Gillanders who told him that the catch plan was increasing from 3,500 PWT to 4,932 PWT. He says that he referred Mr Gillanders to the Fishers' Agreement and the fact that skippers were entitled to be consulted with about the matter, but says that *this went nowhere*. Mr Connolly's evidence was then:

> *I told Scott that this was a major change to our disadvantage and requested a meeting with the General Manager, Mr Doug Paulin, but Scott insisted that all the catch plans were increasing, because as the company saw it, it was overpaying crew or words like that. I did not agree with this at all. It was clear that the decision had been made and any notion of consulting with me as skipper in representing the interests of the crew was just an absolute farce.*

[28] Mr Connolly's evidence was that he later went to see Mr Paulin who *remained firm in his view that the situation was not negotiable*. Mr Connolly said that

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6 I.e., an outlying member of the fleet.

Mr Paulin told him that the change had to happen and that the company could not afford to pay over catch bonus rates.

[29] In his oral evidence to the Authority, Mr Connolly said that, as in the previous several years leading to 2013 the catch plan for the *Rehua* had never changed, remaining at 3,500 PWT, there had been no need for any consultation with the skippers.

[30] Mr Connolly recalled having a meeting with Mr Gillanders on 9 May 2013, but did not believe that they discussed the catch plan, this being instead a discussion about cascade planning for the *Rehua* and other vessels.[7]

[31] Mr Connolly did agree that a phone call took place with Mr Gillanders on 1 August 2013 in which the proposed changes to the catch plan were discussed. Mr Connolly agreed with a statement in the brief of evidence of Mr Gillanders in which Mr Gillanders stated:

> *During our discussion I referred to the requirement to consult with Skippers as provided in the Fishers' Agreement. I explained to Mr Connolly what the proposed changes to the catch plan were and reasoning behind the changes, in particular the historical catch data, the quota for the upcoming fishing year and other operational reasons as described in paragraph 9 above. Mr Connolly expressed concern over the changes to the catch plan and he advised that he wanted to concentrate on fishing and would discuss the proposed changes to the catch plan when he was ashore. He advised that he also wanted to meet with Doug Paulin, General Manager of fishing at Sealord.*

[32] Mr Connolly agreed that he received an email from Mr Gillanders on the same day which included the following attachments:

a. A letter that was to be sent out to all crew on all vessels;

b. A sheet showing the historical PWT that the *Rehua* had produced and bonuses that had been paid out;

c. The *final cut* of the catch/production plan for the 2013/2014 fishing year; and

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[7] The cascade refers to how the fish caught is subsequently processed, such as, for example, a certain sort of fillet with or without the skin.

d. A copy of clause 6.1 of the Fishers' Agreement.

[33] The email included the following statement:

> *Let me know once you have had time to digest this information and are ready to continue the consultation.*

[34] The letter that was attached to the email was a template letter signed by Mr Healey and Mr Gillanders with the heading *Catch Pay Plan Financial Year 2013/14* and which stated:

> *Each year, the Company reviews anticipated quota levels and fishing requirements as part of business and annual planning activities. This letter confirms that changes will be made to all vessel catch plans for the financial year commencing 1st October 2013. Catch pay plans will be aligned with the catch plan.*
>
> *In accordance with clause 6.1 in your employment agreement, these changes will be agreed and communicated to you following consultation with Skippers.*
>
> *Further information will be provided to you by your Skipper in the coming months.*
>
> *If you have any questions in the meantime please contact your Fleet Harvest Manager or Skipper.*

[35] Mr Connolly also agreed that he had a telephone conversation with Mr Gillanders on 5 August 2013 in which the draft catch plan was discussed. However, Mr Connolly said that he did not recall putting up a memorandum on the crew noticeboard, which was referred to in Mr Gillanders' brief of evidence. He agreed that, on 30 August 2013, he met with Mr Paulin to further discuss his concerns about the catch plan for the 2013/14 fishing year and that, by the end of the fishing year, the *Rehua* had achieved 5,249 PWT so that a catch bonus was paid in excess of the annual Budgeted Catch Payment.

[36] Mr Tom Jackman is the other skipper of the *Rehua* and his written evidence was that he found out about the increase to the catch plan from Mr Connolly and that when Mr Jackman spoke to Mr Gillanders about it, Mr Gillanders agreed that any incentive to over catch had been *completely lost* but that the decision had been made. Mr Jackman's evidence was that he subsequently met with Mr Paulin and realised that it was Mr Paulin's intention to do away with the over catching incentive and to

introduce value based fishing which focused on a defined package, but no incentive payments. He said that Mr Paulin was *not negotiable*[8] on any level.

[37] It was Mr Jackman's evidence that a meeting he took part in in May 2013, which was a cascade meeting, was not *overly relevant* to the Catch Plan and therefore could not have been part of the consultation that the company was obliged to carry out with him as one of the skippers of the *Rehua*. However, Mr Jackman did agree during cross examination that cascade planning was part of overall catch plan formulation, as did Mr Rillstone, one of the skippers of the Ocean Dawn.

[38] Mr Jackman said in his evidence that, whilst Mr Gillanders had sent an email to him setting out a Catch Plan for the *Rehua* of 4,932 PWT and saying *let me know once you have had time to digest this information and are ready to continue the consultation*, he regarded consultation as having ended by the time that email arrived. He said that he thought it was a *done deal*. The meeting he had on 5 August reinforced that feeling, he said, as although he was able to talk about the proposed Catch Plan, nothing was going to change.

[39] The evidence of Mr Paulin was that he met with Mr Jackman and told him that, unless there were other factors that the two skippers could give him, the historical performance of the *Rehua*, combined with other known factors, made the Catch Plan being consulted on highly achievable. He says that Mr Jackman could not give those potential other factors, and that his predominant points were that he and Mr Connolly did not agree with the lift in the proposed Catch Plan as it would have an adverse financial impact on the crew and themselves and that there had been no change to the *Rehua*'s Catch Plan for several years.

[40] Mr Jackman's evidence was that his feedback to Mr Gillanders and Mr Paulin was more subtle than that, but I am satisfied that these were the two key points being made by Mr Jackman. Mr Jackman agreed that he did not change his feedback to Mr Gillanders or Mr Paulin prior to the Catch Plan being finalised by the company, which was communicated to crew members of the *Rehua* by way of a letter dated 16 August 2013.

[41] According to the written evidence of Mr Gillanders, the following communications took place with the skippers of the *Rehua*:

[8] By which I understand Mr Jackman to mean that Mr Paulin was not open to negotiation.

a. A meeting on 14 May 2013, during which draft catch plans and cascade planning were discussed.

b. Between May and August 2013 informal phone calls and discussions took place between skippers and factory managers about catch planning for the coming year.

c. On 1 August 2013 a telephone conversation with Mr Connolly occurred *to discuss the proposed changes to the catch plan*. Mr Gillanders' evidence as to what he said during that telephone conversation is set out at paragraph [31] above.

d. On an unknown date, a telephone conversation took place with Mr Jackman during which, Mr Gillanders says, he advised Mr Jackman that Sealord was proposing to bring the *Rehua* in line with other vessels by setting a catch plan which reflected the current fishing conditions, was achievable and allowed for crew to over catch per the similar margin of Sealord's other vessels depending on performance. Mr Gillanders says that Mr Jackman accepted that the *Rehua* had not had its catch plan adjusted for nine years and needed to be changed, but thought that the change was too great and wanted to negotiate further. Mr Gillanders said that he advised Mr Jackman that he was able to discuss the proposed changes to the catch plan with Mr Paulin and he encouraged him to meet with Mr Paulin to discuss his concerns further.

e. On 1 August 2013 Mr Gillanders sent to each skipper a consultation pack including the draft catch plan and draft Cascade Plan.

f. On 5 August 2013 Mr Gillanders met with Mr Jackman to discuss his concerns. Mr Gillanders states the following in his evidence:

> *Mr Jackman did not provide any reasons as to why the catch plan was not achievable, he simply insisted that his view was that the catch plan was set to allow for crew to over catch and to incentivise the crew and he thought the change was too great and that it should be done in a staged approach. Mr Jackman wanted to negotiate further on the proposed changes to the catch plan. I explained that the business couldn't continue to make such large over catch payments, it wasn't sustainable but*

> *the proposed catch plan allowed for a fair and achievable over catch based on historic catch information. I explained I could not negotiate further unless he pointed out an error in the catch plan. I offered to arrange a meeting between Mr Jackman and Mr Paulin to discuss his concerns about the catch plan. Mr Jackman explained that he had already arranged to meet with Mr Paulin later that day to discuss his concerns.*

g. On 5 August 2013 Mr Gillanders had a telephone call with Mr Connolly in which he explained to Mr Connolly how the company had reached the draft catch plan and that if he felt the catch plan was unachievable or had a fault in it, he needed to let him know.

h. On 14 August 2013 Mr Gillanders advised both skippers by phone call that the catch plan was to be set at 4,932 PWT for the fishing year 2013/14 and that a letter would be sent to all crew to that extent.

[42] On 30 August Mr Paulin met with Mr Connolly to further discuss Mr Connolly's concerns about the catch plan.

Was there meaningful consultation with the skippers of the *Rehua*?

[43] The process followed by Mr Gillanders with respect to the *Rehua* was characterised by Mr Connolly and Mr Jackman, essentially, as a *fait accompli*. I understand that, to adopt the terminology of *Telecom*, they assert that there was *mere notification*.

[44] First, I am satisfied that sufficient information was given to the skippers of the *Rehua* prior to the change to the catch plan being implemented. This is clear from the emails that passed from Mr Gillanders to the skippers of the *Rehua*.

[45] I am also satisfied that Mr Jackman and Mr Connolly were given the opportunity to comment on the information prior to it being implemented. I would go further and say that the skippers of the *Rehua* were given *a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties*. I am satisfied that Mr Connolly and Mr Jackman were *free to say what they [thought]*.

[46] I am also satisfied that the process allowed sufficient time before the new catch plan was implemented.

[47] Mr Jackman said in evidence that he felt he should have been consulted with prior to Mr Gillanders sending out his email of 1 August 2013 stating that the final cut of the catch – production plan for the 2013/14 fishing year would be 4,932 PWT. However, it was not unreasonable for the company to have stated its views as to what the appropriate Catch Plan should be, as a starting point, against which consultation could take place.

[48] I also accept that the respondent was not obliged to take into account as a determining factor alone the impact upon the fishers of the increase in the Catch Plan. Provided that the company did give consideration to that factor, they were entitled to take into account other factors, and even to give more weight to those other factors in reaching their final conclusion as to what the appropriate Catch Plan would be.

[49] The key question that arises from the particular sets of facts relating to Mr Gillanders' interactions with the skippers of the *Rehua*, however, is whether there was a genuine effort made to accommodate the views of those being consulted. If there was not, then the consultation can be deemed to be a charade and not a reality.

[50] Having heard the evidence of Mr Peter Connolly, Mr Jackman, Mr Gillanders and Mr Paulin, I am satisfied that Mr Gillanders and Mr Paulin did genuinely consider the representation being made by the skippers of the *Rehua*, but that they did not agree that the factors being raised, which focussed on the economic effect on the crew of changing the catch plan, were sufficient to change their view that the *Rehua* was demonstrably capable of a catch greatly above the Catch Plan that it had historically always been allocated. There was no obligation during consultation for agreement to be reached between the parties.

[51] Whilst I fully understand why the skippers and crew of the *Rehua* were greatly upset to have had their Catch Plan so significantly increased, thereby impacting on their ability to over-catch, and on the rate at which their bonus would be paid, I am satisfied that the company had proper grounds for increasing the Catch Plan tonnage of the *Rehua* – namely, to more accurately reflect what the vessel had been catching - and that they did engage in genuine and meaningful consultation with the skippers of the *Rehua* even if they did not concede on their initial intentions.

Fishing Vessel Otakou

[52] The *Otakou* is Sealord's only fresher vessel, all others being freezer vessels. Evidence was given to the Authority by Mr Gavin Knight, one of the skippers of the *Otakou*, who states that, in 2013, the catch plan for the *Otakou* was increased initially from 8,200 GWT to 11,200[9] GWT, after which it was decreased to 10,500 GWT. Mr Knight says that this lower catch plan was still viewed as being unfair, but that he was told that the matter was not negotiable. He states that there was no opportunity to consult about the situation for the better of the crew.

[53] Mr Knight said that the *Otakou* did not meet the increased catch plan because the quota was not available and the following year it was lowered to 9,200 GWT.

[54] Mr Knight stated in his evidence that:

> *The reason why I say that the increase to the catch plan was unfair is directly linked to the contractual entitlement to over catch, which in turn flows down to benefit crew.*

[55] Mr Knight agreed that he had received an email from Mr Healey dated 29 May 2013 which stated:

> *Hi all, here is the latest catch plans for next year with assumptions made around extra hoki quota.*
>
> *Can you please review and give me any comments.*
>
> *As mentioned before Doug is very keen on your pay catch plan number being the same as your catch plan, but if you want to disagree with it you will need to have viable points as to why you think it might not be catchable.*
>
> *I think it is pretty realistic and has a few buffers in there.*
>
> *There are still a few things that haven't been decided yet that could affect them but think we are getting close to signing these off soon.*
>
> *Your thoughts are appreciated.*
>
> *Regards,*
> *Bill*

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9 Actually 11,293 GWT

[56] Mr Knight said that he had two meetings after he had received that email with Mr Paulin where they disagreed with the green weight tonnage that was being proposed.

[57] On 23 August 2013 the skippers clearly had a discussion with Mr Paulin, as this is referred to in a subsequent email that was sent to Mr Paulin, and one other person, from Mr Knight and Mr Candy, the other skipper of the *Otakou*, which was dated 4 September 2013. This email set out in some detail their objections to the proposed increase of the GWT to 11,293.

[58] The Authority saw a copy of an email from Mr Healey to Mr Paulin and one other person dated 4 September 2013 in which Mr Healey set out *a few things we can do in conjunction with a vessel to assist*. The Authority also saw an email from Mr Paulin to Mr Candy and Mr Knight dated 4 September 2013 in which Mr Paulin set out some proposals to assist the *Otakou*'s skippers and crew, which included adjusting the catch plan down to 10,500. It also included a proposal to guarantee the crew's pay package. Mr Knight's evidence was that the *Otakou's* catch plan was set at this level but that there was a final adjustment in September 2014 to 8,500 GWT. It is understood that bonus payments were paid out at the end of that fishing year against that final adjusted catch plan.

[59] When I consider the *Telecom* principles in relation to the process that took place with respect to the *Otakou*, I am satisfied of the following:

a. The skippers of the *Otakou* clearly knew what was being proposed before they were expected to give their views;

b. The skippers were given an opportunity to state their views, and took that opportunity;

c. The consultation was not treated in a perfunctory way by Sealord;

d. Sufficient time was given for the consultation; and

e. Genuine effort was made to accommodate the views of Mr Candy and Mr Knight.

[60] I reach this final conclusion on the basis that the respondent did reduce the catch plan tonnage to 10,500 GWT having given consideration to the representations of Mr Candy and Mr Knight. Although Mr Knight maintains that the tonnage of 10,500 was still too great, and unrealistic, which was proven by the eventual adjustment in September 2014, the requirement under clause 6.1 of the Fishers' Agreement is that there be consultation with the skippers about the catch plan. There is no requirement for there to be agreement.

[61] I am therefore satisfied that genuine consultation with respect to the *Otakou* occurred, which was meaningful.

Fishing Vessel Thomas Harrison

[62] Evidence was heard from the former skipper of this fishing vessel, Mr Roger Connolly, by telephone. Mr R Connolly's evidence was that there was no consultation with the skippers of the *Thomas Harrison* with respect to the changes to the catch plan for that vessel. He says that he was simply told by Mr Healey that the catch plan had been increased and that there was no negotiation or any opportunity to talk about the change. He says that the approach by shore management was *like it or lump it*. Mr Healey denies that he said that Mr Roger Connolly could *like it or lump it*.

[63] The Authority saw a copy of an email from Mr Healey to Mr R Connolly dated 13 May 2013 in which a spreadsheet appears to have been attached setting out what Mr Healey called *the Pay Catch Plan* for Mr R Connolly's vessel of 7,800 GWT. The exact wording of the email was:

> *FYI and comment.*
>
> *We would work on your pay catch plan at 7800gwt, maybe look at PWT as well.*

[64] On 29 May 2013 Mr Healey sent an email to Mr R Connolly in the same terms as cited above in paragraph [55] in relation to the *Otakou*.

[65] Mr R Connolly agrees that he had informal discussions with Mr Healey about the proposal to change the catch plan from GWT to PWT, saying that that was a good idea. Mr R Connolly also agrees that Mr Healey met with him and that the draft catch

plan was amended. Mr R Connolly sent an email in reply to Mr Healey on 31 May 2013 saying:

> *hello have read the c/plan looks reasonable except for the 1080 hok 09/14, reasons being fish quality and the quantity of fish left at that time of the yr. do not think we could do 3 trips in that mth. think 1-1.5 trips would be closer to it on past experience. also would need access to west coast in 5/14 chrs roger*

[66] Mr Healey sent an email to Mr R Connolly and the other skipper of the *Thomas Harrison* on 10 July 2013 saying:

> *Hi, here is your amended catch plan going forward.*
> *Can you please look very carefully at the plan and come back to me.*
> *Main change is a lot more hoki that has pushed your catch plan up to just over 9000gwt.*
> *This equates to just over 5000 pwt.*
> *We need to decide if we are going for PWT or GWT this coming year.*
> *Doug has signalled that the pay catch plan will be same as the catch plan.*
> *Look at it and ask, what is not achievable?*
> *With the research and the lack of quota in the past it is good to finally get something like a full catch plan.*
> *Let me know your thoughts ASAP.*
>
> *Bill*

[67] Mr Healey's evidence is that he had ongoing discussions by telephone and in person with the skippers of the *Thomas Harrison* during August 2013 and that they were able to discuss it with Mr Paulin.

[68] On 1 August 2013 Mr Healey sent to Mr R Connolly and the other skipper of the *Thomas Harrison* a standard email enclosing his proposed letter to the crew, the final catch plan, and clause 6.1 of the Fishers' Agreement. The email included the words:

> *Let me know once you have had time to digest this information and are ready to continue the consultation. I am happy to discuss things like what happens if our catch plan changes and would moving to a PWT be better.*

[69] It is Mr Healey's evidence that he had ongoing discussions with the skippers of the *Thomas Harrison* during August and that they met with Mr Paulin on both 20 August and 4 September. Mr Healey states that he and Mr Paulin continued to

discuss the proposed changes to the catch plan for the *Thomas Harrison* with both skippers and that, on or about 12 September, agreement was reached.

[70] On 12 September 2013 Mr Healey sent an email to Mr Paulin saying:

> *Doug, this is the basis for the agreement with both skippers on the TH as to the pay catch plan for Fishing Year 2014.*
>
> *1/ Both skippers accept the catch plan at 9198 gwt.*
> *2/ The crew will be paid on PWT which is in the plan at 5154pwt.*
> *3/ That the company accept that should the catch plan be changed by the company to accommodate more ORH[10] or any other species, the crew will not be at a disadvantaged as a result.*
>
> *Consultation will continue with both skippers about any catch plan change.*

[71] It was Mr R Connolly's oral evidence to the Authority that his meeting with Mr Paulin did not last very long and that they did not get very far because they were not very polite with one another and the discussion became heated. He said that *inappropriate things were said*. Mr R Connolly said that the conversations were so heated the consultation was not possible and that *neither side was going to move*. Mr Paulin's response to this was that Mr R Connolly and he did agree the Catch Plan eventually.

[72] Mr Healey's oral evidence to the Authority was that he did take on board concerns expressed by the skippers of the *Thomas Harrison* about securing West Coast hoki, which Mr Healey addressed.

[73] Mr Healey also said that, on 14 September, Mr R Connolly came to see him and disputed the PWT figure he had previously agreed, but that, after much discussion, it was agreed that the vessel was capable of catching that level of fish but that Mr Healey agreed to reduce the catch plan to 5,022 PWT, which is what Mr R Connolly thought the GWT equated to. He said that both skippers agreed to these changes. Accordingly, the skippers notified the crew that the agreed changes had been made.

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10 Orange roughy

[74] In February 2014 further consultation took place with the skippers over a reduction in the catch plan and it was agreed that it would be reduced from 5,022 PWT to 4,223 PWT. This change was implemented on 24 March 2014.

[75] When I consider the evidence, I am satisfied of the following:

a. The skippers of the *Thomas Harrison* knew what was proposed and were given sufficiently precise information to enable them to state a view;

b. They were provided with an opportunity to state that view;

c. They were free to say what they thought;

d. They were given sufficient time.

[76] However, there appears to be a direct conflict of evidence between Mr R Connolly and Mr Healey about whether a genuine effort was made to accommodate the views of the skippers. Whilst it appears that the respondent was determined to increase the catch plan for the *Thomas Harrison*, I accept that it they did make accommodations after concerns were raised by Mr R Connolly about sourcing sufficient West Coast hoki and about the conversion from GWT to PWT. In addition, although this did not occur until February 2014, during the relevant fishing year, the company reduced the catch plan significantly once it became clear that they had overestimated how much hoki could be caught.

[77] There is no obligation for parties to agree in consultation. It is clear that estimating the catch plan for a given vessel in a given fishing year is subject to a great many complex and interrelated criteria which only experienced fishers and fleet managers can calculate. It is no surprise that, from time to time, skippers and fleet managers will disagree as to what may be achievable. What is important is that the skippers are able to make known their objections, and the basis of them, and the fleet managers genuinely consider those objections.

[78] In light of the fact that the respondent addressed Mr R Connolly's concerns about securing West Coast hoki, changed the conversion from GWT to PWT following representations from Mr R Connolly and, later, following consultation with

the skippers, reduced the catch plan significantly, I am satisfied that meaningful consultation took place in accordance with clause 6.1 of the Fishers' Agreement.

Fishing Vessel Ocean Dawn

[79] The Authority heard evidence from Mr Justin Rillstone, skipper of the fishing vessel *Ocean Dawn*. He stated in his evidence to the Authority that, in August 2013, just prior to going to sea, Mr Gillanders informed him that the vessel's Catch Plan would be increasing from 3,700 PWT to 4,400 PWT. Mr Rillstone said that there was no consultation but that the information was essentially dropped on him and on the other skipper of the vessel, Mr Stephan Fridell.[11]

[80] Mr Rillstone said that, when he raised his concerns about the lack of consultation, Mr Gillanders told him that he could not take it any further and that he would have to deal directly with Mr Paulin. Mr Fridell and Mr Rillstone met with Mr Paulin subsequently and Mr Rillstone says that the strong message that came across was that the decision had been made and that there was no room for negotiation.

[81] During his oral evidence to the Authority, Mr Rillstone stated that he believed that every vessel should have the ability to over-catch. However, Mr Rillstone agreed that he had no arguments with the evidence given in Mr Gillanders' brief of evidence in relation to the consultation with the skippers of the *Ocean Dawn*. In brief, Mr Gillanders' evidence was that he met with Mr Rillstone (together with Mr Jackman) in May 2013 for a cascade planning meeting, and that draft Catch Plan and cascade plans were provided at that meeting and emailed to skippers at sea.

[82] Mr Gillanders said that he met with Mr Rillstone and Mr Fridell on 11 July 2013 to review the draft Catch Plan and to discuss the proposals to change the cascade from a skin-off to a skin-on cascade. Mr Gillanders said that he and both skippers of the *Ocean Dawn* discussed the level of increase proposed by the draft Catch Plan, the difference in recoveries that a skin-on cascade would have, contributing to a higher conversion to PWT, and that they reviewed the plan for correctness.

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[11] Mr Fridell was unable to give evidence as he was at sea on each of the Authority's investigation dates.

[83] Mr Gillanders said that around 1 August 2013 he called Mr Rillstone to discuss the draft Catch Plan again and had a similar discussion with Mr Fridell, who was at sea. A consultation pack was sent by Mr Gillanders to both skippers which included a letter which was to be sent to crew. Mr Gillanders said that, on around 6 August 2013, he met with Mr Paulin to discuss the *Ocean Dawn* skippers' feedback and in particular the concern that the *Ocean Dawn* was new to the fleet and that the proposed Catch Plan levels had not been achieved historically. Mr Gillanders said that he and Mr Paulin discussed the change to the skin-on cascade, the level of planning to date, the factory improvements and crew development and experience and considered that the proposed draft Catch Plan was therefore achievable and fair.

[84] Mr Gillanders said that he met with Mr Fridell and Mr Rillstone again on 8 August 2013 and told them that he and Mr Paulin believed that the Catch Plan of 4,400 PWT was a realistic and achievable one.

[85] Mr Gillanders' evidence is that he met with the crew of the *Ocean Dawn* on 9 August 2013 and that, towards the end of that meeting, Mr Rillstone entered and explained that both he and Mr Fridell had negotiated and agreed to a guaranteed Catch Plan with Mr Paulin.

[86] On the basis of Mr Gillanders' evidence, and Mr Rillstone's acceptance of it during the Authority's investigation meeting, I am satisfied of the following:

a. The skippers of the *Ocean Dawn* clearly knew what was being proposed before they were expected to give their views;

b. The skippers were given an opportunity to state their views, and took that opportunity;

c. The consultation was not treated in a perfunctory way by Sealord as sufficient time was given for it to take place; and

d. Genuine consideration was given by the respondent company to the concerns raised by Mr Rillstone and Mr Fridell.

[87] The respondent guaranteed a catch bonus for the *Ocean Dawn* crew so that the annual budgeted catch payment would be paid to them fully once the vessel achieved 3,900 PWT and an over-catch bonus would be paid if the vessel caught over

4,400 PWT. It is agreed that the *Ocean Dawn* achieved 4,799 PWT for the fishing year 2013/2014 so that a catch bonus payment was paid in excess of the annual budgeted catch payment.

[88] In conclusion, I am satisfied that there was sufficient and meaningful consultation with the skippers of the *Ocean Dawn* in relation to the Catch Plan and that there has been no breach of the fishers' agreement, nor of the respondent's duty of good faith in this respect.

Fishing Vessel Aukaha

[89] Only one witness gave evidence in respect of fishing vessel *Aukaha*, Mr Kain Johansen. Mr Johansen is a factory engineer who has been working continuously for Sealord since November 2012 (although he did work for them previously). Mr Johansen is also a vessel delegate for the *Aukaha*.

[90] Mr Johansen was unable to say why neither of the skippers of the *Aukaha* had been called to give evidence on behalf of the Guild, although he said that his skipper supported him giving evidence.

[91] Mr Johansen said that he had no meetings with respect to changes to the Catch Plan in 2013 and had no knowledge of other members of the crew having such meetings. His evidence was that the Catch Plan had increased for his fishing vessel which meant that bonus rates had decreased.

[92] Mr Johansen agreed under cross examination that the terms of clause 6.1 of the collective agreement had the effect that Sealord was not obliged to consult with anyone except skippers. He said that he had been told by his skipper that no consultation had taken place with him. Mr Johansen also accepted that the terms of clause 6.4 of the collective agreement stated that a fisher's annual remuneration could be reduced to below his budgeted catch payment figure if the vessel did not achieve its Catch Plan.

[93] Mr Johansen agreed that he had not been involved in discussions with the skippers of the *Aukaha* in August 2013 and that he was not in a position to disagree with what Mr Healey had stated in his brief of evidence.

[94] It was Mr Healey's evidence that, during August 2013, he had ongoing discussions by both telephone and in person with the skippers of the *Aukaha* about the proposed Catch Plan and that the discussions were amiable. Mr Healey stated in his evidence that he understood that the skippers were happy and agreed to the proposed Catch Plan which was in accordance with their expectations from the previous year. The proposed increase for the *Aukaha* was from 3,500 PWT to 3,865 PWT and the actual catch for the 2013/14 fishing year was 4,026 PWT.

[95] Mr Johansen's evidence that there had been no consultation between the company and the skippers of the *Aukaha* was hearsay and, as such, whilst not inadmissible in the Authority, carries far less probative weight than the direct evidence of Mr Healey.

[96] According to Mr Healey's evidence, the draft Catch Plan was provided to the skippers of the *Aukaha* in May 2013 and, again, on 10 July 2013. He emailed a consultation pack to the skippers on 1 August 2013 and wrote letters to crew of the *Aukaha* on 3 August 2013, stating that he was consulting with the skippers of the *Aukaha*. According to Mr Healey, he then had discussions by telephone and in person with the skippers and those skippers agreed to the proposed Catch Plan. He also said in his oral evidence that he did make changes in respect of the catching of East Coast hoki as a result of representations of the skippers.

[97] In light of this uncontested evidence, I am satisfied that the communications between Mr Healey and the skippers of the *Aukaha* constituted meaningful consultation in accordance with the requirements set out in clause 6.1 of the fishers' agreement.

Was there a contractual or statutory duty to consult with crew members about the plan to align catch plans with catch pay plans?

What was meant by a catch pay plan and the intention to align it with the catch plan?

[98] In several communications from the respondent to the skippers and crew of various vessels, there were references to the company intending to *align the Catch Pay Plan with the Catch Plan*. In an email from Mr Healey to Mr R Connolly and others, there is the line *as mentioned before Doug* (Paulin) *is very keen on your Pay*

Catch Plan number being the same as your Catch Plan. There is also reference in letters to crew to *Catch Pay Plans will be aligned with the Catch Plan*.

[99] The evidence of nearly all the witnesses for the applicant was that they had never heard of the phrase *Catch Pay Plan* before and it was clear that these witnesses did not understand at the time the phrase was first used by the respondent, in or around August 2013, what was meant by the concept.

[100] During his evidence to the Authority at the investigation meeting in June 2015, Mr Healey said that the phrase *catch pay plan* was one that had been used to his knowledge for several years. It would appear that it was known to shore management but not sea-going crew or skippers.

[101] Mr Healey's evidence was that, when the Catch Plan is at the proposal stage, and going through the consultation process, it is referred to as *the Catch Plan*. However, once the final tonnage of the Catch Plan for any particular vessel has been *locked down*, that detail is sent to the payroll department of the respondent company so that the bonus rates for each member of the crew can be calculated. At that point the Catch Plan becomes the *Catch Pay Plan*.

[102] Therefore, according to Mr Healey, the Catch Plan and the Catch Pay Plan are one and the same thing, the different terminology being used to describe its two different stages.

[103] When asked about the meaning of *aligning* the Catch Plan with the Catch Pay Plan, which had been referred to by both him and Mr Gillanders in several emails and letters, this explanation became less credible. Mr Healey accepted, in questioning by the Authority, that according to his definition, the Catch Plan and the Catch Pay Plan had always been aligned because it had always been the case that the bonus rate for any particular member of the crew was a pure mathematical function of the final tonnage set in the Catch Plan and the bonus element of the Budgeted Catch Payment, expressed in dollars.

[104] Mr Healey then said that the reference in the emails and letters to the aligning of the Catch Pay Plan and the Catch Plan really only affected the vessel *Rehua*, for which he was not responsible, and that this was because the *Rehua* had, for the five years preceding the 2013/14 fishing year, been catching 5,000 PWT per year (and

that, therefore, was its *Catch Plan*) compared to a *Catch Pay Plan* of 3,500 PWT, by reference to which the ability of crew members to over catch and earn additional bonus was calculated.

[105] Mr Gillanders, who was responsible for the *Rehua*, and Mr Paulin said effectively the same thing in their evidence as Mr Healey. No one could explain, however, why the official catch plan of the *Rehua* (3,500 tonnes) had never been increased to reflect its actual annual catch of around 5,000 tonnes, although Mr Paulin surmised that it was as a result of mismanagement by former managers.

[106] Mr Healey agreed that the references to aligning the Catch Plan and the Catch Pay Plan in emails to skippers and letters to crew who were assigned to other vessels were therefore unnecessary. He explained this by saying that the wording of the emails and the letters had been standard wording which he and Mr Gillanders used because that was what they had been advised to say.

[107] It is my view, however, that this explanation is not credible. I say this because the Authority saw a copy of an email from Mr Healey to the skippers of the *Aukaha* which stated:

> *Doug has indicated that Pay Catch Plans will match the Catch Plans.*

[108] In addition, as noted above, Mr Healey emailed Mr R Connolly (skipper of the FV *Thomas Harrison*) and others, saying *as mentioned before Doug* (Paulin) *is very keen on your Pay Catch Plan number being the same as your Catch Plan*

[109] These communications use different terminology to many of the other emails, but express the same concept of alignment of Catch Plans and Catch Pay Plans in respect of vessels other than the *Rehua*.

[110] It is my finding, on a balance of probabilities, that the concept of *aligning Catch Plans with Catch Pay Plans* was intended by the respondent to mean matching the official Catch Plan of a vessel with the maximum that it was considered likely to catch in the fishing year in question. In other words, I agree with the view of the Guild that the purpose expressed by the concept of aligning Catch Plans with Catch Play Plans was, effectively, to eliminate or at least reduce, over catching with respect of all vessels, not just the *Rehua*.

Should the respondent have consulted with skippers, crew members and/or the Guild separately about aligning catch plans with catch pay plans?

[111] The concept of *aligning Catch Plans with Catch Pay Plans*, being another way of expressing the elimination or reduction of over catching, is the contrary position to the Guild's assertion that the crew and skippers had a right to over catch. I therefore examine these opposing positions together.

[112] It is the view of the Guild, expressed by its counsel, that the respondent had an obligation to consult about the alignment of the Catch Plans with the Catch Pay Plans in addition to that obligation referred to in clause 6.1 of the collective agreement. Namely, an obligation to consult with crew about the change in strategy that had been put into effect by the decision to eliminate over catching.

[113] The applicant is relying on an argument that custom and practice and/or *an arrangement between the parties evolving over a significant period of time and premised on mutual understandings in setting annual catch plans for mutual gain and increased reward*[12] have implied into the Fishers' Agreement, or into the individual terms and conditions between the crew members and the respondent, a right which prevents the respondent from setting catch plans which could adversely impact upon the ability of fishers to over catch (in other words, by aligning the catch plans with the catch pay plans). Some witnesses for the Guild also referred to a *verbal agreement* to over catch. By *verbal agreement*, I understand the fishers to be referring to an oral agreement, or oral representation made with, or to them at the time of their recruitment and/or during their employment.

Custom and practice

[114] With respect to the argument that the crew members have a right to over catch at levels that they had previously enjoyed (or, indeed, at all) which has been implied by way of the mechanism of custom and practice, it is trite law that a term cannot be implied into an agreement which is contradicted by an express term. In this particular case, the express wording of clause 6.4 of the collective agreement contemplates that a vessel not achieving its annual targets would result in a Catch Bonus reducing the fisher's annual remuneration to below his Budgeted Catch Payment figure. This

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12 Paragraph 31 of Ms Sharma's submissions in reply.

clearly expressly contradicts the term that the applicant wishes to be implied. I therefore reject this argument.

Verbal agreements

[115] Mr Jackman said in his oral evidence to the Authority that, when he had been recruiting people as a skipper, he had been told to tell the crew that it was accepted that they should end up with pay which was around 20% more than was stated in their individual terms. He said that over-catching had been *part of the deal*. He said that he also understood that having a right to over-catch applied across the fleet and not just to the *Rehua*.

[116] This evidence of Mr Jackman was echoed by other witnesses who serve on board the fishing vessel *Rehua*, namely that they had a longstanding *verbal* agreement that they could over-catch.

[117] Mr Paulin said that such an agreement would have had a huge impact on the operations of the business and he would have expected it to have been recorded in writing and approved by the CEO of the Group. Mr Gillanders and Mr Paulin both referred to the company conducting an investigation after they had realised that the existence of verbal agreements were being claimed, and that it could find no evidence in writing, or from other managers of such an agreement.

[118] Whilst several witnesses spoke of them having had a verbal agreement made with them that they could over-catch, that is in direct conflict with the express terms of clause 6.4 of the relevant collective agreement in which it is stated:

> *If annual targets are exceeded the Catch Bonus provides an opportunity to increase the fisher's annual remuneration beyond his/her Budgeted Catch Payment figure. Similarly, if the vessel does not achieve its annual targets then the Catch Bonus would reduce the fisher's annual remuneration to below his/her Budgeted Catch Payment figure.*

[119] Furthermore, clause 28.3 of the collective agreement refers to it superseding and replacing the individual employment agreements made between the fisher covered by the agreement and Sealord prior to the date of ratification of the collective agreement. It also refers to Sealord issuing a new appointment letter to every fisher

bound by the collective agreement to confirm his personal rate of remuneration and other terms of employment that are not inconsistent with the collective agreement.

[120] In addition, s.61(1) of the Employment Relations Act 2000 (the Act) provides:

> ***61 Employee bound by applicable collective agreement may agree to additional terms and conditions of employment***
> *(1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are—*
> *(a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and*
> *(b) not inconsistent with the terms and conditions in the collective agreement.*

[121] Whilst it is clearly the common view of most, if not all, of the witnesses who gave evidence to the Authority on behalf of the Guild that they had an orally agreed contractual right to gain guaranteed additional bonus through over-catching (in the case of the *Rehua* crew, up to 20% above their individual bonus element maximum) it is evident from the express terms of the operative collective agreement that was in force during negotiations leading up to the 2013/14 fishing year (and which continued after its expiry date pursuant to s.53 of the Act, so that it continued in force during that fishing year in question) the terms of the collective agreement cannot be overridden by the oral agreement that the witnesses say they had the benefit of. The terms of such an oral agreement, guaranteeing over-catching, are clearly inconsistent with the express terms of clause 6.4 of the collective agreement. Therefore, they cannot prevail by virtue of clause 28.3 of the collective agreement and s.61(1)(b) of the Act.

Was there a duty of good faith to consult with crew notwithstanding the terms of the 2012-13 Fishers' Agreement?

[122] It is the view of the respondent's witnesses that this was not its obligation for the following reasons:

a. There was no obligation pursuant to the collective agreement to consult with members of the crew, only with skippers;

b. The crew would not be in a position to negotiate with the respondent about the Catch Plan as many of the crew did not have the requisite knowledge or experience to do so;

c. In any event, many of the witnesses, including skippers, said that they felt skippers to be in the position of representatives of the crew during the negotiations about the respective Catch Plans of the different vessels.

[123] First, as a general principle, I accept that an employer's duty of good faith is not completely fulfilled merely by compliance with an express contractual obligation where the effects of the employer's actions pursuant to its contractual obligation are likely to have an adverse impact upon employees which is not contemplated in the contractual obligation as expressed.

[124] In other words, if it were not clear from the wording of clause 6 of the Fishers' Agreement that adverse financial effects could be suffered by crew members by way of the respondent exercising its right to change catch plans, and its obligation to consult skippers about doing so, the respondent would have obligations of good faith to consult with those potentially affected employees or with their representatives over and above its contractual obligations.

[125] However, I do not accept that the respondent's desire to align Catch Plans with Catch Pay Plans falls outside of the scope of the express wording of clause 6 of the 2012-13 Fishers' Agreement. First, whilst some skippers may not have been familiar with the term *Catch Pay Plan*, they were all clearly very much alive to the interrelationship between their vessel's Catch Plan and the ability to over catch. They were all, also, in a position to seek clarity about the meaning of the term *Catch Pay Plan*.

[126] Second, it is clear from the express wording of clause 6.1 that payment for permanent fishers is based on a Catch Plan determined annually by Sealord in consultation with the master (i.e., skipper) of the vessel. This statement, when read in conjunction with the remainder of the relevant parts of clause 6, clearly ties the remuneration of crew members to the Catch Plan that is set by the respondent.

[127] Furthermore, clause 6.4 makes absolutely clear that, if a vessel does not achieve its annual targets, then the catch bonus would reduce the fisher's annual remuneration to below his Budgeted Catch Payment figure.

[128] Therefore, clause 6 expressly contemplates that a possible outcome of a change in a vessel's Catch Plan would be an adverse effect on the Catch Pay Plan of its crew, to use the terminology of the respondent. This effect encompasses the same effect that would result from *aligning a Catch Plan with a Catch Pay Plan*. The alignment follows on transparently from an increase in a Catch Plan to a given level. Every skipper would have been able to have seen clearly the effect of a proposed increase in a Catch Plan on the ability to over catch. As I have found above, there was no right of fishers to be able to over catch.

[129] Furthermore, the evidence from several skippers made clear that they were negotiating with the respondent in respect of the 2013/14 fishing year on behalf of their crew. Several stated that crew members are not in the position to negotiate for themselves and that the skippers were therefore seeking to protect the interests of their crew. Therefore, the respondent was, in any event, consulting with the crew through the skippers, who the crew accepted as their representatives, and who the Fishers' Agreement impliedly appointed as the crew members' representatives for the purposes of consulting about the catch plan, and ability to over catch.

[130] Finally, I do not find that clause 2.1 of the Fishers' Agreement obliged the respondent to consult the crew directly about the obligation to align catch plans with catch pay plans as that clause contemplates changes to terms and conditions of employment arising out of the need for flexibility not contemplated elsewhere in the agreement.

Conclusion

[131] I find the following:

a. The fishers did not have a right to over catch, either by way of a term implied by custom and practice or by way of an express oral agreement; and

b. The respondent's wish to align vessels' Catch Plans with the crews' Catch Pay Plans did not require separate consultation with skippers,

> crew or the Guild as that desired outcome fell squarely and transparently within the scope of the respondent's right to change catch plans, and the respondent was able to discharge its consultation obligations solely by consulting with skippers as required under clause 6.1 of the 2012-13 Fishers' Agreement.

[132] In addition, in any event, I accept the evidence of the respondent that not a single crew member who worked through the entirety of the 2013/14 fishing year failed to achieve at least 100% of his Budgeted Catch Payment and, indeed, it would appear that the majority of crew received bonus payments above their Budgeted Catch Payments.

Was there a contractual or statutory duty on the respondent to consult with skippers and/or crew about the effects of an increase in a vessel's catch plan upon bonus rates?

[133] This question arises because of the effect on bonus rates (expressed in dollars per tonne) of a change in the catch plan tonnage for any vessel. The applicant accepts that the rate derives formulaically from dividing the bonus element of the Budgeted Catch Payment by the Catch Plan tonnage. However, it is the applicant's case that crew members were unaware that their rates could reduce in this way, and that the respondent had a duty to consult specifically about that effect. Ms Sharma also submits that the rates are positional (i.e., linked to the position held by each crew member) and have never been reduced before.

[134] As I have already stated in paragraph 124 above, if it were not clear from the wording of clause 6 of the Fishers' Agreement that adverse financial effects could be suffered by crew members by way of the respondent exercising its right to change catch plans, and its obligation to consult skippers about doing so, the respondent would have obligations of good faith to consult with those potentially affected employees or with their representatives over and above its contractual obligations.

[135] I accept the applicant's argument that clause 6 does not expressly refer to bonus rates. It refers to the possibility of a fisher's Catch Bonus reducing if a vessel does not achieve its annual targets, but that is quite different from the rate at which the bonus is paid being reduced. This is clear from the fact that that rate is likely to be

less than previous years, even when a vessel's annual target is exceeded, when the catch plan tonnage has increased.[13]

[136] Therefore, I accept that the respondent had a statutory duty of good faith to ensure that skippers and crew were aware specifically of the effect on their bonus rate of a proposed increase in their vessel's catch plan.

[137] However, I accept the evidence of the respondent (given by both Mr Gillanders and Mr Paulin) that the skippers would have been well aware of that effect when they were first told of the proposed increases to the catch plans of their respective vessels. Mr Paulin spoke of the extensive experience of the skippers, their extensive knowledge of the industry and the commensurately high rewards they receive by way of their remuneration. I believe that it would be inconceivable that the skippers would not have been immediately aware of the effect on the bonus rate in dollar terms of an increase in their vessels' catch plans, as the formula is so simple and conceptually obvious.

[138] I also note that, when an employer gives employee representatives information in the context of a consultation process, reasonably knowing that the representatives would be fully aware of all the ramifications of that information, they do not have to spell out every such ramification.

[139] I have also found that the skippers were negotiating with the respondent in respect of the 2013/14 fishing year on behalf of their crew, and that the crew accepted this. Therefore, by the skippers being aware of the effect on bonus rates of the proposals, and the skippers being the crews' representatives in the consultation communications, it must follow that the respondent was consulting with the crew, through the skippers, about, inter alia, the effect on the bonus rates of the proposed increases to the catch plans. Therefore, I find that the respondent fulfilled its statutory duty to consult with the crew about that effect.

[140] I do not accept that the bonus rates are *positional*, other than indirectly (in that they are derived from the bonus element of a Budgeted Catch Payment, which is partly reflective of a crew member's position). The rate at which a bonus is paid must be derived purely from the dollar amount of the bonus element and the tonnage of the

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[13] I say *likely* to be less because theoretically the effect of a significant increase in a fisher's budgeted catch payment could outweigh the effect of a modest increase in catch plan tonnage.

catch plan. To pay the bonus at any other rate would simply not work, as the rate is not independent of those two elements. If rates had never been reduced before 2013, as is asserted by Ms Sharma, that must only be because catch plans had never been significantly increased before.

Are skippers covered by the Fishers' Agreement?

[141] First, I agree with the submissions of counsel for the respondent that skippers employed by the respondent can only be covered by the Fishers' Agreement if they are both members of the Guild and fall within the coverage clause of the Fishers' Agreement. No evidence was provided by the Guild as to which skippers were its members during the life of the 2012-13 Fishers' Agreement, and so this determination can only address whether skippers fall within the coverage clause in general terms.

[142] The question of whether skippers fall within the coverage clause is not a straightforward one because of a number of competing factors, which can be summarised as follows:

[143] For the respondent, the following arguments suggest that skippers (who, it is accepted by both parties, are also known as *masters* and *captains*) cannot be covered by the collective agreement because:

a. The coverage clause of all the Fishers' Agreements in force since 1 July 2001 referred only to *crew*;

b. The terms *skipper* and *crew* in everyday language convey mutually exclusive concepts;

c. The skipper is in complete charge of the vessel when at sea, and is a senior manager otherwise, which makes their role incompatible with the terms of the Fishers' Agreement;

d. All skippers are employed under individual employment agreements (save possibly for one skipper who has never signed the agreement that was given to him) which are different to the terms of the Fishers' Agreement;

e. The Guild had sent a notice to the respondent to initiate bargaining a collective agreement just for skippers.

[144] Arguments for skippers being covered by the collective agreement are as follows:

a. Up to 30 June 2001, *masters* were expressly referred to as being covered by the Fishers' Agreement;

b. Even though, from 1 July 2001, the coverage clause of the Fisher's Agreement only referred to crew, it no longer referred to officers or trainees either, who, the respondent concedes, are still covered by the Fishers' Agreement;

c. Mr McAlister, a former Secretary of the Guild and very long standing member of the Guild's Executive, which has been a party to each Fishers' Agreement, had no knowledge of why a change in the coverage clause was made with effect from 1 July 2001;

d. No other applicant witness, nor any respondent witness could account for the change in the respective coverage clauses as between 30 June 2001 and 1 July 2001.

e. Until 2013, the respondent paid the skippers' Guild fees;

f. Many skippers remain members of the Guild;

g. All skippers who gave evidence regarded themselves as covered by the collective agreement;

h. Skippers negotiate with the respondent on behalf of the crew;

i. Skippers are expressly bound by certain specific terms of the 2012-13 Fishers' Agreement.

[145] Before examining these arguments in turn, it is necessary to outline the principles of contractual interpretation that should be applied.

[146] The Employment Court succinctly set out the principles for interpretation of a collective agreement in *Association of Staff in Tertiary Education Inc: ASTE Te Hau Takitini O Aotearoa v Hampton*[14]. I cite from paragraphs [19] and [20]:

> *[19] Next, what is the correct approach? Agreements should be interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question. The law has now moved on from the earlier position that such evidence was only admissible when the words of the agreement were ambiguous or unclear. Indeed, the current state of the law appears to be that in all cases such reference is possible and even desirable. The Court of Appeal has developed the following approach in contract cases. One looks first at the words used – they must obviously be the starting point - and then at the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words. This approach has been described as "cross-checking": Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd [2001] NZAR 789 (CA).*
>
> *[20] The Court is required to adopt an objective approach to interpretation and this has always been so. What matters is not what the parties say they actually intended the words to mean, but what a reasonable person in the field, knowing all the background, would take them to mean. So evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts. That is because if such evidence was admissible, it would often, perhaps inevitably, be concluded that the parties disagreed. Second, the whole point is that a final written agreement supersedes the negotiations; positions may have changed in the course of negotiations and the final document is the agreed version which might involve a compromise of the respective parties' positions. Third, there is a sense in which an agreement takes on a life of its own, liable to be used and relied on by third persons who were not privy to the negotiations. That is particularly so in the case of employment agreements. Those other parties may include new employees, persons wishing to purchase a business whose operations are covered by an employment agreement and other employer/employee/unions in the same sector looking to settle their agreements.*

[147] His Honour Judge Couch expanded on the principles of *Hampton* in *Lyttelton Port Company Ltd v Rail and Maritime Transport Union*[15] at [16] and [17] as follows:

> *[16] Although that statement of principles was made in 2002, it still provides a sound foundation on which to base the interpretation of employment agreements. In addition, both counsel also relied on the principle enunciated by Judge Colgan later in that decision that the*

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14 2002] 1 ERNZ 491 (EmpC)

15 [2013] NZEmpC 224

> *interpretation of an agreement "should not be narrowly literal but should be in accord with business common sense."*[16]
>
> *[17] I also adopt three more principles which are relevant to this case:*
>
> > *(a) It is permissible to have regard to the history of the provisions of a collective agreement as evidenced by prior agreements.*[17]
> > *(b) Evidence of subsequent conduct may assist the Court in the interpretation of a collective agreement as a further means of cross checking the natural meaning of the words used.*[18].
> > *(c) The provision of the agreement under consideration must be read to give effect to all of its words.*[19]

[Footnote numbers adapted to conform with those of this determination].

[148] Finally, His Honour Judge Ford comprehensively set out the legal principles of contractual interpretation of collective agreements in the Employment Court case of *Progressive Meats Limited v. Pohio & Ors*[20] where, at [29], he stated as follows:

> *There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in Investors Compensation Scheme Limited v West Bromwich Building Society*[21] *which were adopted in New Zealand in Boat Park Ltd v Hutchinson*[22] *and recently reaffirmed in Vector Gas Ltd v Bay of Plenty Energy Limited.*[23] *As both counsel relied on the stated principles, I set them out in full:*
>
> > *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.*
> > *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

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16 *Hampton*, at [23]
17 *Hansells (NZ) Ltd v Ma [2007] ERNZ 637 at [25]*.
18 At [37]-[38]
19 *New Zealand Merchant Service Guild IUOW Inc v InterIsland Line* [2003] 1 ERNZ 510 at [34].
20 [2012] NZEmpC 103
21 [1997] UKHL 28
22 [1999] 2 NZLR 74.
23 [2012] NZSC 5

> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945)*
> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191,201:*
>
> > *"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*.

[149] The key question that needs to be answered in respect of the current Fishers' Agreement is, *what is meant by "crew"?* In order to answer this question, I examine the various issues raised above in paragraphs 143 and 144. Some of them I examine as different sides of the same coin.

The coverage clause of all Fishers' Agreements in force since 1 July 2001 refers only to crew

[150] The Authority was shown copies of Fishers' Agreements dating back to 1998. Not every agreement was available to the Authority between 1998 and 2013, although Fishers' Agreements covering two consecutive periods (1 July 2000 to 30 June 2001 and 1 July 2001 to 30 June 2002) were disclosed, which are useful in examining this question.

[151] Clause 1.1 of the Fishers' Agreement covering the period 1 July 2000 to 30 June 2001 provided:

> *1.1 The parties to this contract are Sealord Group Limited or any subsidiary ("Sealord" or the "Company") and all seagoing staff including the master, officers, fishers and trainees crewing any vessel operated by Sealord Group Limited or any of its subsidiaries and the New Zealand Fishing Industry Guild. The terms of this contract shall be extended to cover new employees.*

[152] This is similar wording to that contained in the Fishers' Agreement covering the period 1 July 1998 to 30 June 2000.

[153] However, this clause had changed significantly in the Fishers' Agreement covering the period 1 July 2001 to 30 June 2002 so that clause 1, headed *Parties to Agreement*, reads as follows:

> *The respective parties to this collective employment agreement are set out below:*
>
> *1.1* *Company:*
> *Sealord Group Limited or any subsidiary ("Sealord" or the "Company").*
>
> *1.2* *Union:*
> *The New Zealand Fishing Industry Guild Incorporated, a union duly registered under the Employment Relations Act 2000 ("the Union" or "the Guild").*
>
> *1.3* *Coverage:*
> *(a)* *This agreement shall cover all Guild members who are employed by Sealord as crew on the FV Taimania, Thomas Harrison, Otakou, Rehua, Aoraki, Kiwa and Taharaki.*
>
> *(b)* *New employees whose work falls within the coverage clause shall be covered by this agreement upon joining the Union or as set out in section 62 of the Employment Relations Act for the first 30 days of employment.*
>
> *(c)* *Members of the Union covered by this agreement at the time of signing are listed in the schedule here to.*

[154] The copy of this Fishers' Agreement did not have the schedule attached. However, a copy of the Fishers' Agreement furnished to the Authority covering the period 1 July 2007 to 30 June 2009 had the same wording under the coverage clause as the 1 July 2001 to 30 June 2002 Fishers' Agreement cited above (although some of

the vessels had changed) and that copy did have a schedule attached. However, I note that this schedule does not appear to have the skippers listed in its main body although they have been listed in manuscript by an unknown hand. This is not conclusive, therefore.

[155] The fact that the 1 July 2001 to 30 June 2002 agreement contains a coverage clause that no longer refers to masters, officers or trainees, and which is materially identical to that of the 2012-13 Fishers' Agreement cited above in paragraph 12, raises the fairly strong inference that an express agreement must have been reached between the Guild and the respondent that skippers were no longer covered by the agreement. However, the mere fact that an express reference to *masters* has disappeared does not, of itself, mean that masters are no longer covered. This is because there is also no longer any express reference to officers or trainees in the 1 July 2001 to 30 June 2002 agreement.

[156] The term *officer* is no longer used in the respondent company, or in the New Zealand fishing industry in general but, according to Mr Paulin, used to refer to the captain, chief engineer, first mate, first engineer and second engineer. All of these roles, apart from that of the captain, are now regarded as crew and are covered by the Fishers' Agreement Mr Paulin said. Trainees are also regarded as crew and are covered by the Fishers' Agreement.

[157] Therefore, one cannot safely infer anything from the disappearance of the term *masters* from the coverage clause in the 1 July 2001 to 30 June 2002 agreement alone.

Ordinary meaning of the words "skipper" and "crew"

[158] The respondent argues that the ordinary meaning of the words *skipper* and *crew* show that they are different, mutually exclusive concepts and that crew cannot include the concept of skipper. I accept that assertion about the ordinary meaning of those two words. However, first, the fishing industry is a specialist industry which is unique in its operation and terminology used in particular industries can have different meanings to those used by laymen[24].

[24] The legal world is a case in point, where the terms "discovery" and "without prejudice", for example, have special meanings not widely understood by non-lawyers.

[159] Second, even if within Sealord itself the two terms are now mutually exclusive in their general usage, the same general distinction would once also have been the case with respect to the terms *officers* and *crew*. Now, however, the term *officer* has fallen into desuetude within Sealord, and most members of the former officer class have become subsumed into the term *crew*. In other words, the meaning of a term in an agreement now does not necessarily assist in understanding its meaning when it was first used in the agreement. Whilst the Authority's investigation relates to the latest version of the Fishers' Agreement, the meaning of the term *crew* now may well be informed by its meaning when it was first used exclusively in the coverage clause in 2001. The term *crew* in the Fisher's Agreement obviously had a different meaning in 2000 than it did in 2001 as, by 2001, it had subsumed the majority of members making up the officer class.

[160] Finally, the coverage clause in the Fishers' Agreement cannot be read in isolation from the rest of the agreement.

[161] In summary, I do not regard this argument as being determinative on its own.

The skipper is in complete charge of the vessel while at sea

[162] This is uncontested. However, it is also clear that the respondent uses the skippers, and relies upon them, to communicate with the crew about issues affecting the latter. A case in point is the consultation process that is undertaken when the respondent wishes to change a vessel's catch plan, which would impact upon the crew members' bonus. Whilst *chew the fat* meetings take place between the fleet harvest managers and the crew for time to time, it is the skippers who advise the crew members on a day to day basis of the effects of the proposals and the progress of the consultations.

[163] The skippers also negotiate with the respondent on behalf of the crew regarding catch plans. This evidence to the Authority, which was given by several skippers, was not seriously contested by the respondent.

[164] In addition, the skippers have always been in complete control of their vessels while at sea, and yet they were expressly covered by the terms of the Fishers' Agreements up to 30 June 2001.

[165] Again, I do not find that this factor alone persuades me that skippers are not covered by the Fishers' Agreement.

The incompatibility of the Skipper's role with the terms of the Fishers' Agreement

[166] One of the submissions of the respondent in arguing that the Fishers' Agreement cannot be intended to include skippers is that, in various parts of the Fishers' Agreement, there is reference to the masters having authority over the crew and that this supports the contention that skippers cannot have been intended to have been covered by the terms of the Fishers' Agreement.

[167] The respondent submits that it must be clear that skippers and crew are fundamentally different from one another and that it cannot make sense that a master who was taking a prescribed drug (for example) would have to disclose that fact to himself, as is required by clause 10.9 of the 2012-13 Fishers' Agreement. There are several other clauses in the 2012-13 Fishers' Agreement in which *fishers* (which term is not defined) are expressly required to follow the directions of the master (such as in clause 3.4, which deals with fishers needing to get prior consent from the vessel master in order to be able to work for other fishing companies).

[168] On this particular point, I accept that the 2012-13 Fishers' Agreement frequently signals a difference between crew (and/or fishers) on the one hand and the master or skipper on the other. However, that fact in itself does not preclude skippers from being covered by the collective agreement. First, the agreement also states that an *officer with delegated authority* may direct crew and/or fishers (in clause 3.1) and, as we have already seen, officers are now subsumed within the definition of crew. For example, the First Mate, who uncontestably falls within the coverage clause of the 2012-13 Fishers' Agreement, stands in for the skipper on board ship when the skipper is asleep or otherwise off duty.

[169] Secondly, it is common for collective agreements in various industries across the country to cover different categories of employee, some of whom will have authority over others.

[170] The fact that skippers obviously have complete control of the vessel and all of the crew while at sea also does not, in itself, preclude the skippers from being part of the collective agreement. This is clear from the 1 July 2000 to 30 June 2001 Fishers'

Agreement in which the skippers are expressly parties to the collective agreement and yet that Fishers' Agreement expressly recognised their authority over the crew who are also parties to it.

[171] For example, many of the clauses in the 2012-13 Fishers' Agreement relied on by the respondent in this argument are similar or identical to clauses in the 1 July 2000 to 30 June 2001 agreement, in which masters were expressly made a party. I cite the following by way of example:

> *3. **WORK COVERED BY THIS AGREEMENT***
> *The work covered by this agreement includes:*
> *...*
> *3.2 Any net mending or any other maintenance as required by the master of the vessel or any officer with delegated authority.*
> *...*
> *3.7 Any other activities associated with fishing vessel operations as may be directed by the master, the Fleet Managers or any officer with delegated authority.*
> *...*
> *4.3 Fishers may not work for any other fishing companies in any capacity (including contracts for services) while employed by Sealord except with the prior written consent of their Vessel Manager or Vessel Master.*
> *...*
> *6.1 Permanent Fishers*
> *... Subject to clause 9 the period of termination notice for all permanent Fishers shall be 28 days by either party unless otherwise agreed between the Master and the Fisher concerned, provided however the notice given by the fisher shall not expire during a trip on, that is, employment may not be terminated at the fishers request during a trip on, unless otherwise agreed in writing between the Master and Fisher concerned.*
>
> *6.2 Probationary Fishers*
> *Staff with less than two seagoing trips or any other longer period agreed with the master on a fishing vessel shall be called probationary fishers.*
>
> *14. **SAFETY***
> *14.1 It is the responsibility of all staff covered by this agreement to work safely, to look after each other's safety and well being and to report any hazards immediately to the master or supervising officer.*
>
> *14.2 All Fishers shall observe all safety procedures and rules issued by Sealord management or the vessel master from time to time.*
> *...*
> *Every fisher who is taking a prescribed drug shall disclose this fact, and the particulars, to the master before embarking on a trip.*

[172] Furthermore, there are some terms of the 2012-13 Fishers' Agreement which expressly bind skippers. I refer, for example, to clause 3.2 which expressly requires the master and fishers to operate the vessel to fish where and as directed by Sealord, to process the catch to Sealord's specifications. Clause 3.3 also expressly requires the master and fishers to agree not to take any action that would cause fish caught and on board to be wasted.

The initiation of bargaining for a skippers' collective agreement

[173] On 25 September 2013 the Guild sent a letter to Michelle Crutchley, the Human Resources Advisor for the respondent in the following terms:

> *Dear Michelle*
> ***Aukaha, Ocean Dawn, Otakou, Rehua and Thomas Harrison Collective Employment Agreements***
> *The above vessel agreements for Skippers expire 30 September 2013 and as per the Employment Relations Act 2000, clause 42, the NZ Fishing Industry Guild Inc wish to initiate bargaining for collective employment agreements for Skippers only. The intended coverage will be for Skippers who are Guild members only.*
> *I seek a written response to the following issue prior to commencement of bargaining: Advice of Sealord procedure how Guild members will be notified of initiation of bargaining.*
> *Ratification of Agreement: I confirm that the Guild require a poll of at least 60% of financial members and at least 50% of the respondents agree to accept the Agreement.*

[174] I do not accept that the fact that a bargaining initiation notice was sent proves in itself that the skippers did not consider themselves as not covered by the Fishers' Agreement. Indeed, its text is predicated upon the skippers regarding themselves as being covered by the Fishers' Agreement which was about to expire. I therefore do not consider this to be conclusive.

Skippers with individual employment agreements

[175] The respondent asserts that the skippers must have ceased to have been employed under the terms of the Fishers' Agreement with effect from 1 July 2001 because all skippers (with the possible exception of one, who appears to have never signed his individual agreement) are employed under the terms of an individual collective agreement. This evidence is not conclusive either though.

[176] Mr Candy is currently the skipper for the *Otakou* and he entered into an individual employment agreement on 14 September 2001, two and a half months after

the 1 July 2001 Fishers' Agreement came into force. This agreement contained the same remuneration terms as the Fishers' Agreement, save that it also made available to Mr Candy a *target bonus*, as well as options under a Total Remuneration Package, including a car and a superannuation package.

[177] Mr Knight gave evidence that, in 2005, he was told by the company that he was no longer covered by the Fishers' Agreement, although he believed he still was. The Authority was shown a copy of a letter dated 19 October 2005 addressed to Mr Knight and signed by a fleet manager of the respondent company, which was headed *Individual Employment Agreement – Confirmation of Employment Terms and Conditions*. This letter set out, amongst other things, details of Mr Knight's total remuneration package, his hours of work, his appointment date, his leave rights, rights to terminate, and other terms and conditions. However, the letter was not signed by Mr Knight.

[178] The Authority was also shown copies of other letters addressed to other skippers which set out what were termed *Terms of an Individual Employment Agreement*. The letter addressed to Mr Peter Connolly, dated 7 October 2002, was signed by him on 8 October 2002.

[179] Mr Roger Connolly was given a letter of appointment dated 30 December 1999 which contained terms of employment and which he signed on 1 February 2000. A further letter of appointment addressed to Mr Roger Connolly dated 7 December 2012 was signed him on 5 August 2014.

Are the terms of the individual employment agreements inconsistent with the terms of the Fishers' Agreement?

[180] Section 61 of the Act provides that the terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and not inconsistent with the terms and conditions in the collective agreement.

[181] In *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Energex Ltd*[25], Judge Shaw restated the applicable principles in deciding whether terms were inconsistent in the light of s.61, as follows:

a. The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.

b. The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.

c. The definition of inconsistent is that in the Oxford English Dictionary:

> *Not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous.*

d. If the additional term is more favourable to the employee than the CEA, there is usually no inconsistency.

e. Where there is a true inconsistency and where the two provisions cannot stand together, the CEA must prevail whether the result is perceived as favourable or unfavourable to the employee.

Remuneration provisions

[182] Skippers are on different remuneration terms compared to employees who are subject to the Fishers' Agreement. The terms of the crew members' remuneration are set out in clause 6, and have been replicated at paragraph 12 above. Skippers are remunerated on a different, but overlapping basis, known as a *total remuneration package* (TRP).

[183] The Authority saw a document entitled *Total Remuneration Package Guidelines for Skippers* dated November 2004 which stated that a skipper's TRP is made up of a skipper package and an annual incentive bonus, which is equivalent to 15% of the skipper's package. The skipper's package comprised a catch bonus and a retainer, which is the same basis upon which crew are remunerated, except that the retainer consisted of a base salary and a menu of options including a vehicle,

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25 [2006] ERNZ 749 (EmpC)

superannuation and medical insurance. The catch bonus was dependent upon the achievement of a vessel specific catch plan.

[184] The annual incentive bonus referred to in the 2004 guidelines relied upon the respondent's group results. It appears that in or around 2013, the basis of the skippers' incentive bonus changed, so it was no longer wholly dependent on the financial results of the group, but became dependent upon the relevant business unit and the skipper's individual performance, as measured against agreed key performance indicators. The same retainer and catch bonus continued to apply however.

[185] When considering the remuneration terms of the individual employment agreements, the skippers' terms are clearly more favourable, as they offer the opportunity to enjoy an extra source of income, namely the incentive bonus, which crew members do not have the right to. Apart from being more favourable, however, I do not believe that they are incompatible with the terms of clause 6. Just like all crew members, the skippers' catch bonus will be dependent upon the vessels' respective catch, and will be calculated by reference to the catch plan.

[186] It is instructive to compare other key terms as between the 2012-13 Fishers' Agreement and a skipper's individual employment agreement. I do this by reference to Mr Roger Connolly's individual employment agreement dated 7 December 2012, which dates falls within the period covered by the 2012-13 Fishers' Agreement.

Redundancy

[187] The terms of Mr R Connolly's individual employment agreement relating to his entitlements upon redundancy are more favourable than those set out in the collective agreement for permanent fishers. Whilst there are some other differences in the detail of other terms relating to redundancy and restructuring between the two agreements, there do not appear to be any material inconsistencies between them.

Annual leave

[188] The annual leave provisions of Mr R Connolly's individual employment agreement are no less favourable than those set out in the collective agreement.

Public holidays and sick leave provisions

[189] The public holiday and sick leave provisions are materially identical in both agreements.

Bereavement and parental leave

[190] Both agreements grant the same rights as are conferred by the Holidays Act 2003 and the Parental Leave and Employment Protection Act 1987 respectively. Additional terms in relation to bereavement leave appear in both agreements.

Termination provisions

[191] Whilst Mr R Connolly's agreement requires him to give two months' notice of termination, compared to four weeks in the Fishers' Agreement, he is also entitled to be given two months' notice by the respondent. Overall, this is not less favourable than the terms of the Fishers' Agreement therefore.

Training

[192] Mr R Connolly's individual employment agreement provides that he would undertake training programmes offered by Sealord but that he would receive no additional payment when training occurred during trips off. By contrast, the collective agreement provides that payment would be provided to fishers when training was undertaken on trips off. This does, on the face of it, amount to an inconsistency which is less favourable for the skippers (assuming the same term is in all skippers' individual employment agreements).

[193] This inconsistency alone does not mean, of course, that the skippers cannot be part of the coverage clause of the Fishers' Agreement. All one can conclude is that, if the skippers do fall within the coverage clause, any skipper with the same training clause in his individual employment agreement as Mr R Connolly may be able to argue that it does not bind him. However, the lack of a training payment reflects the fact that skippers are well remunerated and carry responsibilities that would be those of a senior manager in other industries.

Complete agreement clause

[194] Mr R Connolly's individual employment agreement contains a clause that states that it represents a full record of the agreement and replaces all previous agreements or understandings regarding the terms and conditions of his employment with Sealord. This clause does not, again, act as a determinative indication that skippers are not covered by the Fishers' Agreement as, if they were covered, this clause would not bind them.

[195] In conclusion, the majority of the terms of Mr R Connolly's individual employment agreement are either materially identical to, or more favourable than the equivalent term within the Fishers' Agreement. There are some terms which are inconsistent, but that fact does not, of itself, prove that skippers cannot be covered by the Fishers' Agreement.

Determination

[196] This is an unusual case, as it is rare[26] that parties to a collective agreement cannot agree who is covered by it. The question is to be determined by applying the usual contractual interpretation principles. A number of factors have been argued, both for and against the inclusion of the skippers in the coverage clause.

[197] There are three key arguments for skippers being excluded from the coverage clause of the Fishers' Agreement which, although not persuasive when considered separately for the reasons already considered, when taken together, are persuasive. The first is that they are no longer expressly referred to in Fishers' Agreements from 1 July 2001 and that the meaning of the term *crew* is fundamentally incongruent with that of the term *skipper*.

[198] Unusually, no documentation appears to exist which sheds light on the reason for the change, and no witness, despite hearing evidence from 17 of them, many of whom were employed at the material time, had any knowledge of why the change occurred.

[199] The second argument is that all but one of the skippers employed by the respondent has signed an individual employment agreement. If Mr R Connolly's

[26] But not unknown – see for example *Lyttelton Port Company Ltd v Rail and Maritime Transport Union* [2013] NZEmpC 224)

agreement is typical, then they expressly declare that they supersede all previous agreements.

[200] The third argument is that skippers are senior managers and represent the interests of the respondent, and that their position is incompatible with the terms of the Fishers' Agreement.

[201] By contrast, is the firm belief that skippers are still covered by the collective agreement, although the subjective views of individuals cannot be taken into account.

[202] When I weigh up the evidence through the cross checking approach approved by *Hampton*, not a single element of it is determinative in and of itself. What is clear is that the role of skipper is unique, neither falling comfortably within the standard definition of crew, nor management. This is not surprising given the unique nature of the fishing industry. Skippers represent the interests of their crew, and make representations on their behalf to shore management, but are also clearly managers of their vessels, directing all other personnel on the ship.

[203] I must adopt an objective approach and ascertain what a reasonable person in the field, knowing all the background, would take the term *crew* to mean. On balance, whilst no single one of the respondent's arguments are persuasive of themselves, taken together I am persuaded that the 2012-13 Fishers' Agreement does not include skippers in the coverage clause. I reach this conclusion on the basis that a reasonable person would not understand the term *crew* to include skippers in light of the senior position that skippers hold within the respondent company, and in light of the overall content of the 2012-13 Fishers' Agreement. I believe that those terms of the 2012-13 Fishers' Agreement that expressly bind skippers are left-overs from the versions of the agreement that expressly included skippers. This is evidenced by the fact that clauses 3.2 and 3.3 referred to above, for example, were included in the 1998 to 2000 Fishers' Agreement.

[204] I infer from all the evidence that the parties expressly agreed that skippers would no longer be bound by the Fishers' Agreement with effect from the coming into force of the 1 July 2001 to 30 June 2002 Fishers' Agreement. There is no other lawful way that members of a union can be dropped from the coverage clause of a collective agreement. The fact that there appears to be no record of such an agreement independent of the 1 July 2001 to 30 June 2002 Fishers' Agreement itself

may be a result of the formerly more relaxed approach adopted by the respondent adverted to by Mr Paulin.

Costs

[205] I reserve costs. The parties are to seek to agree how costs should be dealt with between them. However, in the absence of an agreement within 28 days of the date of this determination the respondent will have a further 14 days within which to serve and lodge a memorandum of counsel setting out what contribution towards its costs its seeks and the basis for that application. The Guild will then have a further 14 days within which to serve and lodge a memorandum of counsel in reply.

David Appleton
Member of the Employment Relations Authority