

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 40

5554318

BETWEEN ROBSON FISHING  
PARTNERSHIP AND/OR  
IMPULSE FISHING CO  
LIMITED  
Applicant

AND VINCENT SMITH  
Respondent

5534332

BETWEEN VINCENT SMITH  
Applicant

AND ROBSON FISHING  
PARTNERSHIP AND/OR  
IMPULSE FISHING CO  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Tim Jeffcott, Counsel for Robson Fishing Partnership  
and Impulse Fishing Co Limited  
Anjela Sharma, Counsel for Vincent Smith

Investigation meeting: 26, 27 and 28 October 2016 in Nelson

Submissions and further evidence received on: 28 October, 10 November, 2 December and  
14 December 2016

Determination: 22 March 2017

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Vincent Smith worked for Impulse Fishing Co Limited and/or Robson Fishing Partnership (Impulse) as a skipper and crew member from July 2011 until either he

abandoned his employment on 7 August 2014, or Impulse dismissed him on 15 or 21 August 2014.

[2] There are claims made by both parties.

[3] I have issued this determination later than the three-month period allowed after receiving the last documents from the parties. I record that the Chief of the Authority has decided under 174C(4) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing this written determination later than the latest date specified in s 174C(3)(b) of the Act.

### **How the businesses worked**

[4] The Robson family runs a number of related fishing businesses. Geoff and Pat Robson are the parents of Andrew and Mike. The group of Robson companies operate from Neils Beach in South Westland. At the relevant time, the Robsons lived at Neils Beach.

[5] The companies are Impulse Fishing Co Limited (Impulse), Barn Bay Fishing Co Limited, Balas Investments Limited and Arawata Enterprises Limited (Arawata).

[6] Geoff Robson was the managing director of all four companies at the relevant time. Overall, the companies run as an integrated family business.

[7] Geoff<sup>1</sup> says that at the time he was in charge of financial planning, industry compliance, quota management, survey management, decision-making related to capital costs, succession planning and management of staff.

[8] Impulse holds a fishing permit under s 91 of the Fisheries Act 1996. It owns the commercial fishing vessel, the Impulse II, and its fishing gear. In reality, it is Andrew's business. It employs two skippers and, at the time, it employed two to three crew. Andrew was the other skipper of the Impulse II.

[9] Barn Bay Fishing is a Licensed Fish Receiver, and has yearly audits carried out by the Ministry of Primary Industries (MPI). It receives fish from all around New Zealand, including from Impulse, and has considerable experience in lobster fishing.

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<sup>1</sup> Since there are three witnesses who are "Mr Robson" I have chosen to refer to them by their first names only to avoid confusion.

[10] Geoff is experienced in quota management systems and Annual Catch Entitlement (ACE) administration. As a licensed fish receiver, Barn Bay weighs and records its fish products electronically into the Solution Multipliers Programme. This calculates information that Barn Bay needs to file with MPI for its ACE returns (using Fishserve). Geoff was a director and shareholder in Impulse at the relevant time.

[11] Margie Timpson, who is Andrew's partner, was employed by Barn Bay as the office administrator for the group of companies.

[12] Balas is a quota owning company that sells its ACE to Impulse and other fishers.

[13] Arawata is Mike's business. Its core activity is fish oil processing. It also supplies goods, such as fuel, bait and ice, and various services, such as trucking, to fishers. It provides such goods and services to Impulse. Mike is Arawata's Operations Manager.

[14] After each trip the crew and Mike unloaded the Impulse. Arawata is responsible for trucking fish to the relevant licensed fish receiver. When Impulse landings arrive at the licensed fish receiver, a landed weight is taken and a buyer created invoice is emailed to the group's Neils Beach and Hokitika offices.

[15] Mrs Robson or Ms Timpson would then hand write on the invoice who the skipper was for that trip. The skipper is responsible for completing and signing a Catch Landing Return for each trip. That is done only after the buyer invoices are received.

[16] The wet fish season is October to October and the crayfish season is April to April.

[17] In fact, the Impulse was always out of the water for at least part of October for its annual survey in Nelson. Impulse says that all its employees understood that was the time they were required to take their annual leave. Mr Smith says he was paid for annual leave in October but that he did some work for Impulse during the time the vessel was out of the water.

[18] Mr Smith disputes that he was aware that Geoff was in charge of staff management for Impulse. I find that Mr Smith was always aware that Geoff was the ultimate boss of the related businesses. However, it is clear that all day-to-day administration and management of the business as far as Mr Smith was concerned was handled by Andrew, Mike and Ms Timpson.

[19] Impulse employed Mr Smith as the skipper of the Impulse II (the Impulse). He was generally required to work:

on a 2 trips on and 2 trips off rotation, or as directed by the owners during the wet fish season.

[20] His individual employment agreement (IEA) included Schedule A, which set out how he would be paid. When acting as skipper his pay was 18% of the GST exclusive contract price of fish caught per voyage. Levies, quota charges and bait costs were to be deducted.

[21] Mr Smith's IEA said he would have the opportunity to do additional work as a crew member on a crew member's pay rate during the crayfish season. Mr Smith did undertake crewing work in the crayfish season. The IEA does not say how a crew member's pay rate was to be calculated, for crayfish or wet fishing operations. However, Mr Smith accepts crewing for the crayfish season was not paid at 18% and he did not expect it to be.

[22] Mr Smith's employment ended in August 2014 after a dispute about whether he could go on a six-week Nelson Marlborough Institute of Technology (NMIT) course aimed at upgrading his Marine Engineer Certificate 6 (MEC6) to a Marine Engineer Certificate 5 (MEC5). There was also an issue about abuse of, or cruelty to, seabirds by crew that occurred during Mr Smith's voyages as skipper.

#### *Mr Smith's claims*

[23] Mr Smith claims that he was unjustifiably disadvantaged during his employment by not having a copy of his IEA so that he did not know on what basis he was paid. He claims to have been underpaid during his employment.

[24] Mr Smith claims Impulse breached clauses 6 and 7 of his IEA in relation to his annual leave and public holidays. He claims \$20,000 damages for each breach.

[25] Mr Smith claimed penalties for a number of statutory breaches. Ms Sharma conceded at the investigation meeting that some of the breaches happened more than twelve months prior to the date when the cause of action first became known to Mr Smith, or the date when it should reasonably have become known to him.<sup>2</sup>

*Can Mr Smith bring the penalty claims?*

[26] **Under s 64(3) of the Employment Relations Act 2000 (the Act)** Impulse was obliged to provide Mr Smith with a copy of his IEA when he requested it. Mr Smith says he requested a copy on more than one occasion and he was never given it. The employer's obligation to provide the employee with a copy of his IEA exists during the employment relationship. Mr Smith's employment came to an end in August 2014. He did not apply for a penalty until 17 March 2016, the date his first statement of problem was lodged. That is considerably more than 12 months after it first came to his attention that his request had not been honoured. No penalty can be claimed for this.

[27] **Section 130 of the Act** obliges the employer to keep, and provide, a wages and time record of Mr Smith's employment. There is no dispute now that Impulse did not keep such records. Impulse understood it did not need to do so because Mr Smith was not paid on an hourly wage basis or by a salary. However, that obligation still applied. Mr Smith, through Ms Sharma, first requested a copy of the record on 22 December 2014, and again a number of times in order to assess whether he had been correctly paid wages and leave entitlements. There is no doubt that Impulse breached its obligations to Mr Smith to keep the records in the way s 130 requires, and so could not provide them.

[28] The claim for a penalty was made in the statement of problem lodged on 17 March 2016. Mr Smith, through Ms Sharma became aware on 22 October 2015 by way of an email from Mr Jeffcott that the records did not exist because:

We have no other information regarding Vinny's wage calculations, all Vinny's wage and time records was sent to you early in February this year. There are no weekly pay advices.

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<sup>2</sup> Section 135(5) of the Employment Relations Act 2000 provides an action to recover a penalty must be commenced within 12 months of the earlier of those two events.

[29] Mr Smith lodged the claim for a penalty within 12 months of it coming to his attention that there had been a breach of the obligation to keep wages and time records in the form that s 130 of the Act requires. Therefore, this penalty claim may proceed.

[30] I will deal with the issue of a penalty in the next part of the investigation, into quantum, as I have not yet had submissions on this issue from the parties.

[31] **Section 4 of the Act** contains the mutual duty of good faith. A breach of that duty can attract a penalty under s 4A of the Act. The facts of this claim are the same as those relied on for Impulse's unjustifiable dismissal of Mr Smith. If Mr Smith was dismissed that happened on 21 August 2014 at the latest. Mr Smith's claim for a penalty was lodged on 17 March 2016 and is beyond the 12 month time limit. No penalty can be considered.

[32] **Section 28 of the Holidays Act 2003** (the HA) relates to the payment of annual leave in an ongoing way at 8% of the employee's gross earnings, and what a closedown period is. Mr Smith claims Impulse failed to properly calculate his annual holiday pay and failed to properly pay him for public holidays worked.

[33] At this stage, I do not consider that I can assess the question of whether Mr Smith was properly paid his annual holiday pay because that will depend on some other findings about what, if any, quantum of unpaid wages Impulse owes Mr Smith. Determination of this claim will need to wait for the investigation on quantum.

[34] Section 76 of the HA, which applied to proceedings lodged before 1 April 2016, means that no penalty claim can be made for a breach of s 28 of the HA by an employee.

[35] **Section 29** of the HA defines what a closedown period is. Mr Smith says that s 29 of the HA "was not complied with." There cannot have been any breach of this by Impulse.

[36] It may be that what is actually claimed is that Impulse did not properly give Mr Smith notice of the closedown period and the requirement he take his annual leave during that period as required by s 32 of the HA. I do not have any submissions on this issue from either party. However, Mr Smith's evidence was that he was paid his

annual leave in October when the Impulse was out of the water but that he actually still did some work over this period. Impulse's witnesses deny that he did any work over these periods. Ms Sharma noted that the IEA states that "vessel survey work" is listed as work that Mr Smith would do.

[37] I propose to deal with the claim as part of the quantum investigation. However, breaches of s 32 of the HA does not attract a penalty claim.

[38] Mr Smith claims he was unjustifiably disadvantaged by his request for a copy of his IEA not being met during his employment, and by Impulse's failure to comply with the IEA provisions. These claims relate to Mr Smith's allegation that Impulse paid him at a lower percentage rate than he should have been when he acted as a crew member, not a skipper, on wet fishing trips. He claims underpaid wages.

[39] Mr Smith also claims he was unjustifiably dismissed and should be paid lost wages since the dismissal, and compensation for humiliation, loss of dignity and injury to his feelings. He claims interest on his underpaid wages and lost wages.

[40] Impulse says that Mr Smith abandoned his employment. However, if the Authority does not agree, Impulse says that it was justified in dismissing Mr Smith for leaving work without carrying out reasonable instructions and for failing to stop cruelty towards, and abuse of, seabirds when he was skippering the boat. Impulse says that if the Authority determines that Mr Smith was unjustifiably dismissed he contributed so significantly to his dismissal that he should not receive any remedies.

#### *Impulse's claims*

[41] Impulse claims that Mr Smith breached a number of terms of his IEA and caused it to lose income.

[42] It says that in failing to give the two months' notice set out in Schedule A of his IEA Mr Smith caused it financial loss because it could not hire a new skipper within that time.

[43] Impulse claims Mr Smith breached his duty of good faith to it and breached an implied term of his IEA not to mislead it.

[44] It also claims he breached his duty to act safely at all times when in charge of the Impulse in that he steamed back to Jackson's Bay on 6 August 2014, although Mike instructed him to find a safe anchorage for the night and not to travel back.

[45] Impulse claims that Mr Smith was liable at all times when acting as skipper to ensure the crew complied with their responsibilities. The skipper also had an obligation to liaise with the owner over any breaches of the crew's responsibilities. Impulse says that in allowing cruelty or abuse to sea birds by the crew Mr Smith breached his obligations as skipper.

[46] Impulse initially claimed damages for legal costs associated with preventing reputational damage. It has dropped that claim.

[47] Initially, Impulse sought a non-publication order, but did not pursue that.

*What this determination will do*

[48] The parties agreed that the Authority would hold a hearing to decide liability issues and a second hearing to determine quantum, if necessary.

[49] Both parties have accountants, or other experts, that they wish to assess the documents provided by Impulse to clarify whether Impulse paid Mr Smith appropriately during his employment. In paragraphs [199] and [200] I set out the next steps in the investigation to establish what, if any, amounts are owed to Mr Smith .

### **Issues**

[50] The issues I need to consider to determine these proceedings are:

- (i) Did Mr Smith abandon his employment when he left Neils Beach on 6 or 7 August 2014?
- (ii) If not, did Impulse unjustifiably dismiss Mr Smith?
- (iii) To determine (ii), I need to consider whether either or both of the substantive reasons given for Mr Smith's dismissal were reasons a fair and reasonable employer could have dismissed him for in all the circumstances.

- (iv) I also need to consider whether the process used to reach the dismissal decision was the kind of process a fair and reasonable employer could have used in all the circumstances.
- (v) If I decide Mr Smith was unjustifiably dismissed I do not need to consider Impulse's claim that he caused it financial loss by breaching his contract and not giving two months' notice when he left for the NMIT course.
- (vi) Is Mr Smith entitled to any remedies for any proved personal grievance/s. If so, and taking contribution into account, what remedies are due?
- (vii) Is the part of Schedule A of the IEA that deals with deductions for levies etc. void for uncertainty on the basis that those kind of deductions are usually made by a contractor for tax purposes, not from an employee's wages?
- (viii) Was Mr Smith paid appropriately when working as a crew member when on wet fishing trips?
- (ix) Was Mr Smith unjustifiably disadvantaged by not being provided with a copy of his IEA during his employment?
- (x) Did Impulse breach its duty of good faith to Mr Smith?
- (xi) Did Impulse breach its obligation under s 130 of the Employment Relations Act 2000, and should a penalty be imposed on it?
- (xii) Did Mr Smith breach his duty of good faith to Impulse by misleading it, and breach an implied term of his IEA not to mislead it?
- (xiii) Did Mr Smith breach his duty to act safely at all times when in charge of the Impulse when he steamed back to Jackson's Bay on 6 August 2014, although Mike instructed him to find a safe anchorage for the night?
- (xiv) Did Mr Smith breach his obligations as skipper to ensure the crew complied with their responsibilities and to liaise with the owner over any breaches?
- (xv) What are the next steps necessary to determine any remedies and any other quantum owed?

**Did Mr Smith abandon his employment?**

[51] Unjustified and ongoing absence from work for a period of time can, in certain circumstances, constitute abandonment of employment, bringing the employment relationship to an end. It is a kind of termination of employment brought about by the employee. It is communicated by their continued and unexplained absence.

[52] Clause 13 of Mr Smith's IEA reads:

Where the employee has been absent from work for three consecutive working days without notification and/or good cause and is unable to be contacted by the employer, the employee shall be deemed to have abandoned and terminated his/her employment.

[53] Before Mr Smith left Neils Beach he told Mike Robson that he was leaving to go on the NMIT course, and that he wanted his job. Therefore, he was not absent "without notification" and, on the face of it, he had not abandoned his employment.

[54] Impulse may have considered Mr Smith left "without ... good cause". However, in order to conclude that he had "abandoned and terminated his employment" the IEA required Impulse to contact Mr Smith after three consecutive days of absence.

[55] There is no evidence that Geoff tried to contact Mr Smith once those three days were up and before making the decision to dismiss. It is not sufficient compliance with the IEA for Geoff to take at face value Ms Timpson telling him Mr Smith had another job and did not intend to return to work. Impulse was required to contact Mr Smith to discuss the situation.

[56] Therefore, Impulse was not able to rely on the IEA to decide that Mr Smith terminated his employment by abandoning it.

[57] In addition, the email originally sent on 15 August 2014<sup>3</sup> gave other reasons for the termination of Mr Smith's employment. It did not mention abandonment. Instead, the one of the reasons for dismissal was Mr Smith leaving to do the course.

[58] Mr Smith did not abandon his employment. Impulse dismissed him for the two reasons outlined in the dismissal email.

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<sup>3</sup> But not re-sent and received until 21 August 2014.

**Was Mr Smith unjustifiably dismissed?**

[59] Section 103A of the Employment Relations Act 2000 (the Act) sets out the test for justification of the dismissal. I must ask from an objective view whether, in all the circumstances, Impulse acted as a fair and reasonable employer could have acted.

[60] In addition, the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether:

- the allegations against Mr Smith were sufficiently investigated,
- the concerns were raised with him before deciding to dismiss him,
- he had a reasonable opportunity to respond to the concerns, and
- Impulse genuinely considered his explanation before deciding to dismiss him.

[61] An employer's failure to comply with any of these steps is likely to result in a dismissal or action being unjustified.

[62] The Authority may take into account other factors as it thinks appropriate. It must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[63] An employer who does not act as a fair and reasonable employer could act in all the circumstances will be in breach of its duty of good faith to its employee.

[64] Mr Smith contends that his dismissal was not substantively justified, for either reason, and was procedurally unjustified.

[65] Impulse submits that Mr Smith was justifiably dismissed because his actions, in the two areas, were serious misconduct that both justified dismissal.

[66] I look at the two reasons given for dismissal separately.

**Going to the NMIT course – relevant facts**

[67] Mr Smith gained his "skipper's ticket", the inshore launch masters certificate, and his MEC 6 in 2002.

[68] The parties agree that it was very useful that Mr Smith was skilled in engine and gear maintenance, in that the Impulse was too small to include an engineer on the

crew. However, according to Impulse, such a qualification was not a requirement of the job.

[69] Mr Smith's evidence, which I accept, was that a former colleague, who a Maritime New Zealand ad refers to as "a Nelson fishing industry stalwart", told him that the qualification system was changing. Mr Smith understood from that conversation that he would have to upgrade to an MEC 5. He was aware that he probably did not have to upgrade until the following year but says that his former colleague told him he would be well advised to enrol quickly as demand would be steep the following year, and it would be harder to get a place on a course.

[70] The qualification course also covered first aid, sea survival and on-board firefighting. He did that second module of the course in October 2014<sup>4</sup>.

[71] Mr Smith started making enquiries of NMIT in early 2014 and was told that a minimum of four students was required for a course to run. He arranged with his brother and two friends to do a course starting on 11 August 2014.

[72] In late April or early May 2014. Mr Smith made Mike and Andrew aware that he wanted to do the course in August. He conveyed his belief that he had to upgrade his "ticket" or he would not be able to continue skippering the Impulse.

[73] At some point, Mr Smith agreed to do three trips in a row for Andrew to facilitate Andrew and Ms Timpson's move to Nelson, while Andrew agreed to do three trips in a row for Mr Smith to give him coverage while he was on the course.

[74] Mr Smith began making arrangements to gain entry to the course in at least May 2014. On 4 June 2014, Andrew filled out and signed a Certificate of Sea Service certifying that Mr Smith had been acting as Skipper and Engineer on the Impulse II between 13 July 2011 and June 2014.

[75] At the investigation meeting, Ms Timpson's evidence was that she could not remember who told her Mr Smith was going to do the course, but she felt somewhat surprised as she was usually the one who was asked if someone wanted to do a course. She says Mr Smith knew she did not know a lot about fishing industry qualifications.

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<sup>4</sup> That is something to be taken into account in considering what, if any, lost wages are to be paid to Mr Smith.

She later decided he was deliberately keeping her in the dark so that she would understand there was an urgency for him to do the course. She reached that conclusion when Geoff told her Mr Smith was not required to upgrade his qualification yet.

[76] Mr Smith says although he started planning to do the course earlier he did not formally enrol and pay his fees until 23 June 2014.

[77] In late July 2014, Geoff discussed with Andrew plans for the rest of the wet fish season. The business had received a further allocation of ACE for ling and was going to be busier than initially expected from then onwards. Andrew told Geoff that Mr Smith would not be available from mid-August until late September because of his NMIT course.

[78] On 1 August 2014, Mr Smith confirmed with Geoff that he was enrolled for and going to the NMIT course. Geoff told Mr Smith that he did not want Mr Smith to go on that course because the busiest time of the year was approaching. He told Mr Smith that since it was not an immediate requirement that he upgrade his qualification he did not want Mr Smith to do the August course. He also said he had some concerns about Andrew's health and did not want him to do so many trips on as would be necessary if Mr Smith went on the course.

[79] Mr Smith told Geoff he had arranged the course months ago through Andrew, Mike and Ms Timpson. Geoff told him that he was the major shareholder and managing director, so everything had to go through him.

[80] Mr Smith said since the agreement from Andrew and Mike had been in place for months, since he had booked and paid for the course and made all his arrangements he needed to go on the course.

[81] Mr Smith says he did not understand what Geoff said to him on 1 August to be an instruction not to go on the course.

[82] On 5 August 2014, Mr Smith had been at sea fishing since 3 August. He rang the office to discuss unloading the Impulse on Thursday, 7 August. He initially spoke

to Mike, who told him Arawata did not want him to unload the Impulse on the 7<sup>th</sup>, but on the 9<sup>th</sup>. Mike says Mr Smith kept repeating he needed to unload on the 7<sup>th</sup> so Mike handed the phone to Geoff.

[83] Mr Smith says Geoff told him he had called NMIT and cancelled Mr Smith's course. However, it is more likely that Geoff told him he had to do the course at a later date that suited the business better and that he would be able to get a full fee refund from NMIT if he pulled out. Geoff also told Mr Smith the business would pay his fees to do the course the following year.

[84] Mr Smith repeated that he had to do the August course.

[85] Mr Smith says that Geoff told him they had a contract and that it was a master/servant relationship and that he should "get it into my head that *I will do what I am told to do.*"

[86] Geoff told him he could not do his course in August. Geoff also told him that the Impulse could not be unloaded on Thursday, 7 August and he needed to stay out fishing until Saturday, 9 August.

[87] Geoff told Mr Smith that after he brought the boat in on Saturday, 9 August he was to go home for his two trips off and come back and do the next two trips, each trip lasting for about one week.

[88] Geoff also raised the bird issue. Mr Smith asked if he was being sacked. Geoff said that he was not. He says he told Mr Smith:

I was just asking him to do his job. I did say to him that given his stance and the seriousness of the bird abuse issue his resignation might be a good option for everyone.

[89] Geoff hung up on Mr Smith.

[90] Mr Smith was very upset after this discussion. That evening at 7 pm he called Mike and told him he intended to return the vessel and crew to Jackson's Bay that night, and to meet with Mike the next morning.

[91] Mr Smith told him he had to bring the vessel back as he was under too much pressure and duress to operate safely. It was clear that it was the instruction to delay his course and the phone call with Geoff that he was upset about.

[92] Mike told him it would be safer to find a safe anchorage nearby and not come back in, as he was not in a fit state.

[93] Mike says that Mr Smith kept telling him he had to attend the course to meet up with and pick up his friends.

[94] Mike says that when he met with Mr Smith at 7 am the next morning, Wednesday, 6 August, Mr Smith had calmed down considerably. He says that Mr Smith admitted that if he had completed the trip and brought the vessel for unloading on Saturday, 9 August he would still have been able to get to the course on time.

[95] Mike told Mr Smith that Geoff wanted to talk to him. However, Mr Smith told Mike that he did not want to talk to Geoff before he left unless he could have the discussion accompanied by a neutral person.<sup>5</sup> Understandably, such a person was hard to come by at short notice in such a very small community with approximately 8-10 permanent residents, the majority of whom were Robsons, or worked for the Robsons.

[96] Mr Smith left Neils Beach. Before he left, he told Mike that he thought he was being treated unfairly but that he wanted to keep his job. Mike later told Geoff that Mr Smith wanted to keep his job.

**NMIT course – was Mr Smith unjustifiably dismissed?**

[97] I can only assess the fairness of the process, and the decision made, by taking into account the information Impulse had at the time it decided to dismiss Mr Smith. Maritime New Zealand's decision about "ring fencing" or keeping "old or legacy tickets" without having to move qualifications to the new Sea Cert system was introduced in September 2016. Therefore, it could not have been a factor Geoff took into account when considering whether to dismiss Mr Smith.

[98] The letter of dismissal gave a combination of reasons:

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<sup>5</sup> He used the word 'mediator', but did not mean the mediation service provided by MBIE. Mr Smith and Mike understood it to mean a neutral third party.

- misled company staff,
- timing of the course not acceptable to the company ... the company required you to delay sitting the course 'til the new year,
- you refused an alternative option, and
- can give no good reason as to why you have to sit this particular ... course.

### **The NMIT course**

#### *Procedural fairness - Adequate investigation?*

##### Misled other staff

[99] Geoff did not tell Mr Smith he considered Mr Smith misled other Impulse staff about the necessity to do the course. At the investigation meeting, Ms Timpson agreed she told Geoff she felt as if she had been misled. However, under questioning she said she could not remember who told her about Mr Smith going on the course and admits it may not have been Mr Smith; it may have been Andrew or Mike.

[100] Andrew's evidence at the investigation meeting was that he knew it was the MEC 6, the engineering qualification, that Mr Smith was going to study to upgrade and he was aware that was not immediately necessary. However, he thought Mr Smith might as well go then and he could go and do his at a later date.

[101] Geoff did not elicit the above information from Andrew or Ms Timpson before he made the decision to dismiss.

[102] Geoff did not ask Mr Smith about what he had said to whom when he first proposed going on the course in order to investigate whether Mr Smith had misled anyone.

[103] The Robson businesses have a small number of staff and no dedicated HR staff. However, Geoff could have sought expert legal advice to assist him to deal with the concerns he had about Mr Smith's employment. There was insufficient investigation into this allegation.

Timing of the course unsuitable, required to do it the next year but no good reason given why Mr Smith had to do the August course

[104] I accept that Geoff told Mr Smith more than once that he could not go on the August course and asked him why it had to be that particular course. Geoff says, and I accept, that over the phone on 5 August he said that if Mr Smith could give him a good reason why he had to do the course at that time “maybe I can take a different view.”

[105] I accept there was an attempt to investigate why Mr Smith was so set on that course date. However, Impulse was aware that Mr Smith was very emotional and both he and Geoff had been heated when on the phone on 5 August, so much so that Mike handed the phone to Geoff, and Geoff hung up on Mr Smith.

[106] I do not consider there was a sufficient investigation into Mr Smith’s reasons for being so set on that course date. Impulse should have emailed or written to Mr Smith asking again why he was so set on the August date.

*Putting Impulse’s concerns to Mr Smith*

[107] The allegation about misleading company staff was not put to Mr Smith.

[108] Geoff did not directly tell Mr Smith that if he went to the course it was likely he would be dismissed. However, I am certain that Mr Smith knew that was a possibility. Impulse made its decision to dismiss Mr Smith on 15 August 2014, before his two weeks off were up. It did so knowing that he had started on the course. It knew that because Mr Smith and Ms Timpson had lunch together in the first week of the course in Nelson.

[109] However, Impulse did not contact Mr Smith and tell him because he had started attending the course it assumed that he was not going to return to do his two trips on, and ask him to respond to that.

[110] Geoff says that Ms Timpson told him that Mr Smith had already got another job and was not coming back to Impulse after the course. He did not put that to Mr Smith and ask if that was correct. Nor did he refer to that when he wrote the dismissal email.

*Reasonable opportunity to respond?*

[111] Geoff says that he provided Mr Smith with the opportunity to come and talk to him once Mr Smith got back to Neils Beach on 5 August. Geoff says that would have been Mr Smith's opportunity to respond, but Mr Smith did not take the opportunity. However, Mr Smith was not made aware what Geoff wanted to discuss, or the purpose of that discussion and so he could not adequately prepare for the discussion.

[112] Mr Smith was clearly very emotionally upset when he spoke to Geoff on the phone on the morning of 5 August 2014 and when he spoke to Mike later that evening. That was the context in which Geoff expected Mr Smith to come and speak to him, without a representative or support person. In the circumstances, that was not a reasonable expectation.

[113] A procedurally fair approach could have been to write to Mr Smith, putting Impulse's concerns about Mr Smith:

- misleading staff,
- not intending to return for his two trips on, and
- already having another job, and
- inviting him to respond within a defined timeframe, having had an opportunity to get representation or support.

*Did Impulse genuinely consider Mr Smith's explanation before making its decision to dismiss him?*

[114] This aspect of procedural fairness could not be complied with because Mr Smith had not had a reasonable opportunity to give his response. Therefore, his response could not have been taken into account before Geoff, and Mike, made a decision to dismiss him.

[115] These procedural defects were more than minor and resulted in Mr Smith being treated unfairly.

**Substantive reason?**

[116] It is an accepted legal principle that a refusal to follow a lawful and reasonable instruction that amounts to *open and deliberate defiance*<sup>6</sup> or *wilful disobedience*<sup>7</sup> is misconduct of a kind that may justify instant dismissal. Therefore, it is possible that Impulse's decision to dismiss Mr Smith is justifiable, on substantive grounds even if it may not be justifiable on procedural grounds.

[117] The instruction given by Geoff that Mr Smith not attend the August course was lawful in the sense that it was not illegal and did not demand an impossible or dangerous task. I also consider it was within the scope of Mr Smith's contractual obligations. His IEA stated at Schedule A:

Duties

The skipper will work on a 2 trip's on 2 trip's off rotation, or as directed by the owners during the wet fish season. ...

The skipper will directly report and take instruction from the owners and/or the directors of Impulse Fishing Company Limited.

[118] Despite the prior permission, Impulse was entitled to instruct Mr Smith to revert to the two trips off and two trips on rotation that was usual because:

- Impulse's needs had changed with a greater ACE allocation,
- Geoff had a concern about Andrew's health if he undertook more than two wet fish trips in a row straight after the crayfishing season.

[119] It offered him a reasonable alternative of doing the course the following year at its expense, even though the upgraded engineer's qualification was not an essential requirement of Mr Smith's employment.

[120] However, I need to consider whether Mr Smith openly and deliberately defied the instruction or was wilfully disobedient.

[121] I accept that Mr Smith openly and deliberately defied the instruction. Mr Smith came ashore several days before the course was due to start. He could have contacted NMIT to ensure the course could continue without him so his friends and brother were not disadvantaged by not being able to continue without him. As it

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<sup>6</sup> *NZ Printing etc IOUW v Clark and Matheson Ltd* [1984] ACJ 283

<sup>7</sup> *NZ Food Processing etc IUOW v Unilever NZ Ltd* (1990) ERNZ Sel Cas 582 and *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917 (CA).

happened NMIT had enrolled other students on the course and it would have continued even if Mr Smith had not attended.

[122] Objectively speaking, Mr Smith's attendance at the August course was the kind of misconduct that could result in a dismissal. However, the conclusion that Mr Smith intentionally misled staff is not supportable and could not form part of a justifiable substantive reason to dismiss.

### **The bird issue – substantive reason**

[123] The reasons given for dismissal were:

Your employment as Skipper.. requires you taking responsibility for the work management, well being and discipline of the vessels crew (while under your command) this is set out in your employment contract, by your own admission a “culture of cruelty to birds” was allowed to develop and reports from third parties indicate this has been ongoing for sometime (around 2 years).

The fishing industry is very particular to protect birdlife and an industry code of practice is well established, again by your admission this had not been followed.

The Skipper is responsible for the actions of the crew when at sea, you do not seem to understand this and thus I suggest you seek advice if you intend to disclose the above to other persons. I believe the above could seriously disadvantage your future employment in the fishing industry.

...

Your actions ... are not acceptable and considered serious misconduct thus your employment contract with the company is terminated forthwith under section 19 of that contract.

### **Bird abuse**

#### *Sufficient investigation?*

[124] Mr Smith raised the issue of the crew's deliberate mistreatment of seabirds on 1 August 2014 in his discussion with Geoff. An incident had happened, on the trip that had just finished, which a friend of Mr Smith's, Raymond Taylor, had observed. That involved one of the crew deliberately hitting a bird with a gaffe. Mr Smith told Geoff about the incident and said he had told the crew it must stop and that such behaviour would not be tolerated.

[125] At this point, Geoff understood the incident have been a one-off issue. Geoff rang Mr Taylor while Mr Smith was with him. Mr Taylor confirmed he had witnessed bird abuse by the crew.

[126] Geoff asked Mr Smith to bring Bevan Ikin and Robert Dunick, the crew, to his office. While they were there he explained how seriously the fishing industry takes bird abuse and how the industry was working to minimise bird abuse. He told them it must stop.

[127] Geoff and Bevan Ikin's evidence is that Mr Smith became very angry with the crew and yelled at them, directing what he said to Mr Ikin in particular, demanding to know why he abused the birds.

[128] Mr Smith told Geoff he could also check with Jeff Rawles about bird abuse. Geoff says he was concerned about that as Mr Rawles had left about two years earlier.

[129] Unbeknownst to Mr Smith, later that evening Mr Ikin and Mr Dunick telephoned Ms Timpson to complain that they had been told off about bird abuse but had not been given an opportunity to explain that Mr Smith was involved by encouraging them at times. Ms Timpson rang Geoff to tell him that.

[130] Geoff decided to investigate further. He spoke to Jeff Rawles, Jeromy Davidson (also a former employee), Andrew, Mr Ikin and Mr Dunick.

#### *Putting Impulse's concerns to Mr Smith*

[131] Geoff formed the view that the bird abuse had happened more than once, had been happening for some time on Mr Smith's trips, but not on Andrew's trips, and that Mr Smith encouraged it. He says he indicated much of this to Mr Smith on the telephone on 5 August 2014.

[132] However, he did not interview Mr Smith once the crew made allegations against him or put to him that he considered bird abuse had been happening for quite some time. Geoff did not put to Mr Smith the crew's allegations or what Mr Rawles and Mr Davidson, or Andrew had said.

[133] Geoff says he told Mr Smith on the phone what Ms Timpson, Andrew and Mr Rawles had told him because he wanted to "hear his side of the story". He did not

put it to Mr Smith that he had been encouraging the crew's cruelty to and abuse of birds.

[134] I do not consider that was sufficiently raising the concerns in all the circumstances. Mr Smith was at sea and was already clearly upset about the NMIT course. After such a heated discussion he was unlikely to retain all the details of Impulse's concerns.

[135] In addition, Geoff did not tell Mr Smith that Impulse believed he had allowed a culture of cruelty to develop and that he was "disappointed and puzzled" Mr Smith was not taking responsibility for the crew's actions.

[136] Geoff says he would have put his concerns about the bird abuse to Mr Smith if Mr Smith had come to see him on 6 August. However, Mike did not tell Mr Smith, and may not have known, that Geoff wanted to talk to Mr Smith about the bird issue as well as about the course.

*Reasonable opportunity to respond?*

[137] Mr Smith had no reasonable opportunity to respond because the allegations were not sufficiently put to him.

*Did Impulse genuinely consider Mr Smith's explanation before making its decision to dismiss him?*

[138] Given that the allegations were not fairly put to him and he did not have a reasonable opportunity to respond Mr Smith's explanation could not have been taken into account before the decision to dismiss was made.

[139] The fact that Mr Smith left Neils Bay did not have to stop the process. A procedurally fair approach could have been to write to Mr Smith:

- to put the allegations about encouraging the crew to abuse birds,
- for two years, and
- allowing or creating a "culture of cruelty."

[140] The letter could have included a summary of what the crew and the others interviewed had said, and invited Mr Smith to give his explanation, at a meeting or in writing, once he had sought representation or support.

[141] The deficits of fair process were more than minor and resulted in Mr Smith being treated unfairly.

[142] In addition, I have a concern about Geoff's remark to Mr Smith on 5 August 2014, that he was not sacking him but that "his resignation might be a good option for everyone." That showed a degree of pre-determination of the decision to dismiss, before hearing from Mr Smith.

*Substantive justification*

[143] Certainly, if the allegations were true, the encouragement of bird abuse or cruelty is the kind of serious misconduct for which dismissal could be an appropriate sanction.

[144] According to his IEA, Mr Smith's obligations as skipper included:

When in command it is the skipper's responsibility to ensure the crew are at all times aware of their responsibilities and liaise with the owners over any breaches...

[145] The crew's responsibilities, and those of Mr Smith, included compliance with all the relevant legislation, such as the Fisheries Act 1996, the Fisheries (Reporting) Regulations 2001, the Wildlife Act 1953 and the Animal Welfare Act 1999.

[146] However, the lack of sufficient investigation and failing to put the concerns to, and hear from, Mr Smith make it highly unsafe to conclude that he fostered a culture of bird abuse that had been going on for two years. There are certainly no grounds for concluding that Mr Smith admitted ("by your own admission") that he had encouraged or created a culture of cruelty as Impulse concluded. Nor are their grounds to conclude that Mr Smith admitted he had not followed the industry code of practice. It appears that he may not have, if that reference relates to the handbook referred to beginning at paragraph [153]. However, there is no evidence that Andrew's trips complied with it either.

[147] I accept that Mr Smith had an obligation to ensure that no deliberate actions of cruelty or abuse leading to physical harm of sea birds happened under his command. However, in my view the wider circumstances are important in this case.

[148] Those circumstances include that Mr Smith raised a concern with Andrew about the crew's abuse of birds between 18 months and 2 years prior to raising it with Geoff. He asked Andrew how to deal with it. He and Andrew agreed that they would tell the crew it was totally unacceptable. They did so. It appears that abuse stopped when Andrew was skippering, and also stopped at least initially for some time when Mr Smith was skippering.

[149] There is no evidence at all that Mr Smith ever took part in any inappropriate handling of the birds either when skippering or when crewing. Mr Ikink confirmed that Mr Smith never personally hurt any sea birds. Mr Smith vehemently denies ever mishandling or abusing birds. He also denies encouraging the crew to do so or laughing or egging them on. However, he did say that he encouraged the crew to use a plastic crate to put over a bird and lift it and put it into the water from the crate.

[150] That is not an approach to removing birds from a vessel recommended in the the publication included in the Bundle of Documents prepared for the Investigation Meeting entitled "Protected Species Handbook for Inshore Vessels: A resource for inshore vessel operators".<sup>8</sup> The publication includes information on protected species, mitigation methods and industry best practice principles.

[151] Impulse says the handbook was kept in the wheelhouse of the Impulse. However, Mr Smith says he had not seen it until it was provided for the investigation meeting. There is no suggestion the handbook had the status of Impulse policy that Mr Smith was bound to adhere to. The first page of the book notes:

It is important that vessel operators remain current with their understanding of their obligations under the Fisheries Act, Wildlife Act and Marine Mammals Protection Act.

[152] There is no evidence that Impulse had a procedure to ensure it and its employees kept up to date with any changes in the above legislation. There is no evidence Impulse had any policies or procedures relating to handling non-quota species or seabirds. No obligations under specific legislation were drawn to Mr Smith's attention when he was inducted onto the Impulse II. Nor is there any

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<sup>8</sup> A publication produced and published in 2011 by Challenger Finfisheries Management Company Limited in conjunction with the Seafood Industry Council Limited, Northern Inshore Fisheries Company Limited, Area2 Inshore Finfish Management Company Limited and South East Finfish Management Limited.

evidence that Mr Smith or the crew were trained in appropriately handling any sea birds that landed on deck.

[153] The handbook also includes a vessel checklist which allowed a vessel operator to place a “check” beside the following:

- Reporting requirements for seabirds understood.
- Crew understand safe handling procedures for seabirds
- Seabird hotspots and times known and understood for avoidance.
- The number of seabirds present that triggers the vessel to move on understood.
- Mitigation measures for the vessel identified in the vessel plan including:
  - setting and hauling;
  - offal and bait retention;
  - deck lighting;
  - monitoring;
  - mitigation equipment; and
  - seabird release equipment.

[154] In the copy provided to the Authority there are no checks by any of the list items, and I was not supplied with a vessel plan including mitigation measures. That is not to say no mitigation methods were used, as I know that some were, particularly when setting lines.

[155] Andrew was candid in his evidence that he estimated that there would have been approximately 20 accidental, or incidental, deaths of seabirds per year over the combined trips that he and Mr Smith skippered. He was also candid in admitting that although he was aware that their deaths had to be reported no seabird deaths were reported at all during the time Mr Smith worked for Impulse, no matter whether he or Mr Smith were the skipper.

[156] Andrew’s evidence at the investigation meeting was that as far as he was aware it was commonplace within the industry to fail to report sea bird deaths, and the deaths of other non-quota species.

[157] Mr Smith was the one who raised the incident that Mr Taylor observed. He did so appropriately, in relation to that incident. That means that in relation to that incident he liaised with the Impulse's owner, as he was required to do.

[158] There may have been a culture of failing to appropriately deal with Impulse's obligations towards seabirds, but that culture was not entirely created or encouraged by Mr Smith.

[159] Largely because of a failure of fair process in investigating the allegations against Mr Smith and putting them to him there is insufficient evidence that Mr Smith encouraged, created or fostered a culture of cruelty to birds and failed to ensure the crew followed his commands in relation to the birds.

### **Conclusion on unjustified dismissal**

[160] Overall, despite it being reasonable for Impulse to direct Mr Smith to change the date of the NMIT course, Impulse did not act as a fair and reasonable employer could have acted in all the circumstances:

- in the way it reached its decision about either substantive allegation; and
- in reaching its decision that Mr Smith had allowed "a culture of cruelty to birds" to develop that persisted for a period of two years.

[161] Therefore, Mr Smith has a personal grievance of unjustified dismissal.

[162] In failing to act as a fair and reasonable employer could have acted in all the circumstances, Impulse breached its duty of good faith to Mr Smith. That is implied in any finding of unjustified action or dismissal. However, no further or additional remedy flows from that breach.

### **Did Impulse unjustifiably disadvantage Mr Smith by not giving him a copy of his IEA?**

[163] Mr Smith did not have a copy of his IEA during his employment. Mr Smith says he asked for a copy during his employment and was not provided with one. Therefore, he did not know on what basis he was paid and he says that was to his disadvantage.

[164] Mr Smith's evidence was not specific on when he asked for a copy of his IEA and who he asked for it. However, Geoff's evidence is that he was told that his IEA would be kept in an unlocked filing cabinet in Ms Timpson's office.

[165] Even if Impulse denied Mr Smith a copy of his IEA, which is a breach of s 64 of the Act, it does not necessarily become an unjustified action causing disadvantage. So long as Mr Smith is paid what he was owed in line with the provisions of his IEA I do not consider that he suffered a disadvantage to his terms and conditions of employment by not having a copy of his IEA during his employment.

**What rate should Mr Smith have been paid as skipper and when crewing on wet fish trips?**

[166] On 28 July 2011, after Mr Smith had completed a trial on the Impulse, he and Ms Timpson signed an Individual Employment Agreement (IEA). Schedule A provides that Mr Smith was to be a skipper and:

The employee shall be paid for the work performed by him pursuant to this agreement. The skipper's rate will be 18% of the GST exclusive contract price of fish caught by the vessel per voyage. The rate of 18% is inclusive of all work performed on and off the vessel such as fishing gear maintenance and repair, vessel survey work, and any other work deemed appropriate by the employer.

The contract price of the catch is the net catch value less the following. The Crew share will be less any

- levies
- quota charges
- bait costs

[167] Geoff and Ms Timpson gave evidence that they recall both going through the IEA with Mr Smith in detail, clause by clause, before he signed it. Mr Smith denies that happened. I am uncertain why if Geoff was present for the whole time Ms Timpson signed the IEA on behalf of the employer.

[168] I am satisfied that Mr Smith had an opportunity to consider the IEA before he signed it. However, he was not given a copy of his IEA until well after his employment ended. Impulse says it was kept in an unlocked filing drawer in the Neils Beach office and Mr Smith was told at the time of signing that he could access it there. He denies being told that.

[169] The IEA is silent on what rate Mr Smith would be paid if he crewed on wet fish trips. Impulse did not tell Mr Smith he would have that opportunity at the time the IEA was entered into. Instead, it offered him that opportunity verbally later. Mr Smith did a number of wet fish trips crewing while Andrew was the skipper.

[170] Mr Smith did not receive pay slips or copies of the invoices on which his pay rate was calculated. He may have seen copies of some buyer created invoices with 18% written by his name on trips he had skippered and 11% written by his name on trips for which he had crewed.

[171] Mr Smith submits that he should not have had the bait costs, levies and quota charges deducted from the GST exclusive catch value despite Schedule A stating that those costs were to be deducted. Ms Sharma's argument seems to be that those costs are not usually put on employees but are more analogous to the kinds of deductions independent contractors treat as a tax-deductible expense.

[172] Mr Smith and Impulse entered into an employment agreement that clearly stated that Mr Smith's 18% skipper's share of the catch was to be calculated from the catch value exclusive of GST and once bait charges, levies and quota charges were deducted.

[173] The arrangement that skippers and crew are paid on a percentage of the value of the catch is common in the fishing industry, whether for independent contractors, known as sharefishers, or for employees. It is also common that the employer or vessel operator deducts some expenses off the catch value when calculating skipper/crew shares. It is unfortunate that Impulse did not give Mr Smith a clear record of its calculations for each trip. However, so long as it can prove that it stuck to the formula set out in Schedule A, I consider that Schedule A is binding as the method the parties freely agreed on by which Mr Smith would be paid when acting as a skipper. Just because Mr Smith did not have a copy of his IEA to refer to during his employment does not make Schedule A unenforceable.

[174] I note, however, that there may be a difference of interpretation of how Schedule A's formula should have been applied to Mr Smith's earnings. That is an issue yet to determine.<sup>9</sup>

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<sup>9</sup> As yet it is unclear what Mr Smith's objection is to the Schedule A formula used and demonstrated in the Crowe Horwath (second) report, if there is an objection.

[175] Impulse says when Mr Smith worked as crew he was paid at the crew rate of 11%, which was the same rate as the crew were paid when he was skippering. It says he would have known at what rate he was getting paid for these trips as it was common knowledge amongst all the Robson Fishing/Impulse employees.

[176] Mr Smith says that he was never told at what rate he would be paid when crewing on wet fish trips. He considers that he should have been paid the same rate as when he was skippering, that is, 18%. He says when he was crewing he brought with him the same skills and qualification as when he was skippering and so should have been paid 18%.

[177] I received submissions from both parties on this point after the investigation meeting.

[178] Ms Sharma submits that because the IEA is silent on a method of payment for crewing on wet fish trips and Impulse did not supply pay advice/slips Mr Smith was reasonably entitled to presume that he would be paid the skipper's rate, despite acting as a crew member.

[179] Ms Sharma further submits that the duty of good faith obliged Impulse to pay Mr Smith at 18% since it did not provide him with a copy of his IEA, discuss pay rates with him or provide pay information advice to him.

[180] Mr Jeffcott's submissions for Impulse are that Mr Smith knew from the outset of his employment that if he crewed during crayfish trips he would be paid 11% of the net value of the catch per voyage. That is clearly incorrect as Mr Smith was paid \$200 per day, according to the Crowe Horwath report. He was paid a bonus too.

[181] Both parties agree that the possibility of Mr Smith crewing on wet fishing trips was not raised at the time the IEA was entered into. Mr Smith's position relies on an IEA that is silent on the matter.

[182] The fact that the IEA is entirely silent on the matter does not mean that I can 'read in' or presume that crewing on wet fish trips must be paid at 18%, the same as the skipper's pay rate.

[183] Mr Smith's work as crew on wet fishing trips from time to time, while part of his employment relationship, was not covered by Schedule A of his IEA. It follows that a verbal agreement must have been reached with Mr Smith when Impulse needed to find crew, sometimes at short notice. I find that Mr Smith was never obliged to work as a crew member but agreed to do so from time to time.

[184] I do not put any weight on Ms Timpson's statement signed on 9 November 2016 and received after the investigation meeting because there was no permission sought, or granted, to receive further evidence, Ms Timpson has not been able to be questioned on her evidence and nor has Mr Smith had the ability to respond to that statement.

[185] During the investigation meeting, Ms Timpson said that she did not recall telling Mr Smith how he would be paid as crew when he was not crayfishing. I accept that evidence.

[186] However, it is simply not credible that Mr Smith did not ask and/or was not told that he would be rewarded at 11% when he crewed on wet fish trips. It is more likely than not that when the first opportunity for Mr Smith to take on this extra work arose he asked and was told, or was told without asking, what the pay rate would be. Mr Smith was aware that he would be paid 11% when acting as crew on wet fishing trips. He accepted that by going on the trips as crew.

[187] Mr Smith could not have had a reasonable expectation that when he was not acting as a skipper that he should be paid as a skipper. He was not undertaking skipper's duties and could not reasonably be expected to be paid as a skipper.

### **Impulse's claims**

[188] All Impulse's claims against Mr Smith are dismissed. My reasons follow.

[189] Because Mr Smith was dismissed, and did not abandon his employment, and did not fail to give two months' notice, Impulse's claim that he owes it damages for failing to give two months' notice is dismissed.

[190] Impulse has not proved that Mr Smith breached his duty of good faith to it and breached an implied term of his employment agreement not to mislead it in seeking permission to undertake the course.

[191] Impulse has not proved that Mr Smith breached his duty to act safely at all times by steaming back to Neils Beach on the night of 5 August. He arrived safely.

[192] Impulse has failed to prove that Mr Smith breached his obligations as a skipper to ensure the crew complied with their responsibilities. Mr Smith liaised with the owner, first, Andrew, and then later, Geoff Robson, over the breach of the crew's duty not to harm sea birds.

### **What are the next steps in this investigation?**

[193] The Authority officer will be in touch with the parties very soon to arrange a teleconference to set down the process for the further investigation that is necessary. I list here the outstanding issues as I see them.

#### *Compensation under s 123(1)(c)(i) of the Act*

[194] Since I have decided that Impulse unjustifiably dismissed Mr Smith, I need to decide what remedies are due to him.

[195] In deciding on remedies for the personal grievance of unjustified dismissal, I need to consider whether Mr Smith's behaviour contributed to the situation leading to the dismissal in such a blameworthy way that any remedies otherwise due to him should be reduced. Mr Jeffcott made written submissions about this to the effect that if I found that Impulse had unjustifiably dismissed Mr Smith his contribution was so great that any remedies should be reduced by 100%, in reliance on s 124 of the Act.

[196] However, those submissions were made before a Full Court of the Employment Court decided *Xtreme Dining Limited trading as Think Steel v Dewar*.<sup>10</sup> In that case, the Court carefully analysed s 124 and concluded:

... s 124 does not permit complete removal of a previously established remedy. Rather, where there is conduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases,

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<sup>10</sup> [2016] NZEmpC 136, 31 October 2016

notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.<sup>11</sup>

[197] The Employment Court agreed with the Court of Appeal, which emphasised that reducing an employee's remedies by 50% because of their blameworthy contributory fault is a significant reduction.<sup>12</sup>

[198] Although, Impulse made submissions on contribution at the end of the investigation meeting in October 2016 Ms Sharma did not. Neither party has had the opportunity to make submissions in light of the Court's decision in *Dewar*.

*Unpaid and lost wages*

[199] I need to determine whether Mr Smith was paid appropriately in line with his IEA. Ms Sharma has indicated that Mr Smith wishes to have time to consider the analysis of Crowe Horwath's reports undertaken by his own accountant once he returns from sea. That is reasonable because Mr Smith's accountant's analysis and conclusions will be necessary before I investigate any of the quantum issues outstanding, including whether Impulse paid Mr Smith appropriately:

- when skippering,
- when crewing on wet fishing trips,
- when calculating annual holiday pay<sup>13</sup>,
- for public holiday pay.

[200] In addition, I have not had financial information from Mr Smith on his earnings over the period for which he claims lost wages. I need to have copies of Mr Smith's IRD summaries of earnings for the relevant period after his employment with Impulse stopped.

*Penalty for breach of s 130 of the Act*

[201] I need to determine whether a penalty should be imposed for Impulse's breach of s 130 of the Act, and if so, what amount it should be. I will require submissions

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<sup>11</sup> Ibid, at paragraph [216].

<sup>12</sup> Ibid, at paragraphs [221] – [ 222].

<sup>13</sup> This appears to have been calculated at 8% rather than in line with s 21 of the HA.

from both parties made with reference to the Employment Court decision of *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.<sup>14</sup>

*Further mediation*

[202] It may be that further mediation will be useful.

**Costs**

[203] Costs are reserved until all matters have been determined by the Authority, or otherwise settled between the parties.

Christine Hickey  
Member of the Employment Relations Authority

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<sup>14</sup> [2016] NZEmpC 143