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Ashby v NIWA Vessel Management Ltd [2022] NZEmpC 174 (21 September 2022)

Last Updated: 27 September 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2022\] NZEmpC 174](#) EMPC 220/2020

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN KIM ELIZABETH ASHBY

Plaintiff

AND NIWA VESSEL MANAGEMENT LTD

Defendant

Hearing: 7, 8 April, 21 and 22 July 2022 (Heard at Auckland and Wellington)

Appearances: A Halse, advocate for plaintiff
P Shaw, counsel for defendant

Judgment: 21 September 2022

JUDGMENT OF JUDGE J C HOLDEN

[1] After nearly 20 years' service, Ms Ashby was dismissed by NIWA Vessel Management Ltd (NIWA Vessel) for incompatibility.

[2] The Employment Relations Authority (the Authority) found that dismissal to be unjustifiable and awarded Ms Ashby:1

(a) three months' lost wages under [s 123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#) (the Act), and

1 *Ashby v NIWA Vessel Management Ltd* [\[2019\] NZERA 571](#) (Member Campbell).

KIM ELIZABETH ASHBY v NIWA VESSEL MANAGEMENT LTD [\[2022\] NZEmpC 174](#) [21 September 2022]

(b) \$20,000 compensation for humiliation, loss of dignity and injury to her feelings (distress compensation) under [s 123\(1\)\(c\)\(i\)](#) of the Act.

[3] Ms Ashby challenges the determination on a non-de novo basis, seeking an uplift in remedies. She seeks:

- (a) lost wages from the date of her dismissal until the date of hearing; and
- (b) distress compensation of \$100,000.

[4] There is no challenge to the finding of unjustifiable dismissal, but, in the context of defending the challenge, NIWA Vessel says any remedies awarded to Ms Ashby should be reduced because Ms Ashby contributed to the situation that gave rise to her dismissal.

[5] The key issues identified were:

- (a) What is the extent of Ms Ashby's humiliation, loss of dignity and injury to her feelings as a result of her dismissal, including what were the adverse effects on her and were these related to the unjustifiable dismissal or other factors?
- (b) What is the appropriate amount for an order for lost wages?
- (c) To what extent did Ms Ashby's actions contribute towards the situation that gave rise to her dismissal, including by:
 - (i) failing to engage in reasonable attempts to assist her to return to work with the Master of the vessel (the Master);
 - (ii) failing to consider any other option to return to work, other than working on a different shift to the Master?

[6] NIWA Vessel says there is a further barrier to Ms Ashby's claim. It says the Authority's award for distress compensation was what Ms Ashby sought in her statement of problem and therefore she has not identified any error in fact or law in respect of that award, as is required for a non-de novo challenge.

The background events started in 2009

[7] Ms Ashby was dismissed on 15 December 2015, but to understand the circumstances of the dismissal it is necessary to go back to 2009. The pleadings record that much of the background is agreed.

[8] NIWA Vessel is a wholly owned subsidiary of the Crown Research Institute, National Institute of Water and Atmospheric Research (NIWA). It was established in 1996 to own and operate NIWA's major research vessels, Tangaroa, Kaharoa, and Pelorus.

[9] Ms Ashby was employed by NIWA Vessel as a cook on the RV Tangaroa, which is a large research vessel, initially in 1996.2 NIWA Vessel operates two alternating crews on the RV Tangaroa. Each crew works approximately month on/month off over the calendar year and usually spends about six months a year at sea.

[10] The crews live in close, confined quarters 24 hours a day, seven days a week while at sea, and contact with friends and family is limited. The vessel compliment includes the 16 crew plus other sea-going passengers. When there are fewer than 24 people on board there is only one cook; when the number is 24 or more a second cook can be employed.

[11] In 2009, Ms Ashby made a formal complaint alleging sexual harassment by the (then) First Mate. Ms Ashby claimed the First Mate made inappropriate comments to her and put inappropriate pictures on her computer. Ms Ashby's complaint was investigated and upheld; the First Mate was issued with a warning and apologised to Ms Ashby. The minutes of NIWA Vessel's investigation meeting record that he also offered to be moved to the second swing shift, if NIWA Vessel felt it was in the best interests of all concerned. That offer was not taken up.

[12] The First Mate was promoted to Master on 7 July 2011 and Ms Ashby then reported to him.

2 Ms Ashby's employment became permanent in 2003.

[13] Although there were no further incidents of sexual harassment, in March 2014 Ms Ashby raised concerns about the (now) Master's behaviour towards her, which she perceived to be bullying. She did so on a confidential basis and asked that she be moved to the second swing shift.

[14] NIWA Vessel spoke to the cook on the second swing shift about a possible swap, but as he was happy where he was and did not wish to move, no such move occurred. Ms Ashby continued to work with the Master.

[15] On or about 6 August 2014, Ms Ashby was told by the Master that an email from Mr Foothead, the General Manager of NIWA Vessel, containing details of her 2009 complaint against him had been released by email to five NIWA scientists, two of whom would be onboard the RV Tangaroa. Ms Ashby understood from what the Master said that her complaint was being reopened.

[16] Ms Ashby was very upset and emailed Mr Foothead.

[17] It transpired that Mr Foothead had mistakenly attached a copy of a letter to the Master from 2009, inviting the Master to a meeting to respond to Ms Ashby's 2009 complaint, to an email on a totally unrelated matter that he was sending to the Master and the five scientists. Mr Foothead noticed he had made this error shortly after sending the email and was able to recall it from almost all the recipients.

[18] Mr Foothead responded to Ms Ashby, apologising for the distress the situation may have caused her. He endeavoured to explain how the mistake had occurred and advised Ms Ashby that the email had been successfully recalled before most of the recipients had opened it, the exceptions being one of the scientists and the Master. He confirmed that NIWA Vessel had not reopened the case of sexual harassment and that it would only do so if Ms Ashby specifically raised a formal complaint.

[19] This incident was a turning point for Ms Ashby and led her to engage a lawyer. By letter dated 5 September 2014, the lawyer raised complaints about the Master, largely around his failure to communicate properly with Ms Ashby. The letter also raised that the Master's son had been employed to work as a cook with Ms Ashby.

The letter from the lawyer advised that Ms Ashby did not want to cause issues for the company, or for the Master, and that she genuinely loved her job. She did, however, seek to change to the second swing shift, so that she did not have to work with the Master.

[20] At that stage, Ms Ashby commenced sick leave, but she met with Mr Foothead and the Human Resources Manager to discuss the contents of the letter from her solicitor and it was agreed that an independent facilitator would be engaged to work with Ms Ashby and the Master in an effort to restore their relationship.

[21] The facilitation occurred on 20 November 2014. In evidence the facilitator said that, in the morning, before the joint session started, Ms Ashby was quite anxious. Her anxiety physically manifested itself in shaking and quivering. He says Ms Ashby was a bit tearful and showed signs of emotional upset. She agreed, however, that she would take part in the joint session that afternoon, and the facilitator says he felt that Ms Ashby was able to take part, despite still being visibly anxious. The facilitator says he followed his usual practice, which was to make clear to the parties that, whenever there is conflict between people, or disagreements or misunderstandings, how things have got to the current state is a result of contributions of each of them; it is not just one person's fault and there is no point trying to apportion blame because that never works.

[22] In his report, the facilitator set out a number of agreements he says were reached between Ms Ashby and the Master during the facilitation and which were designed to assist them in developing a better working relationship. He recorded an indication from Ms Ashby that she would look to resume her duties for a voyage scheduled to depart Wellington on 28 January 2015. At the end of his report, the facilitator made two specific recommendations:

- (a) both Ms Ashby and the Master reply briefly to the facilitator's email with any further thoughts or reflections they had since the meeting; and
- (b) a joint conversation be held once the Master's current voyage had ended, to check on the agreements made.

[23] On 15 December 2014, however, Ms Ashby's solicitor wrote to NIWA Vessel advising that the facilitation meeting was itself traumatic for Ms Ashby and that the Master's conduct was "protective and argumentative". The solicitor said Ms Ashby was now suffering from various medical conditions which had been diagnosed as arising from acute stress. He asked NIWA Vessel to again consider changing its roster system so that Ms Ashby and the cook on the second swing shift swapped places.

[24] Ms Ashby did not resume sailing as expected in January 2015. There then was a mediation in February 2015, but the matter remained unresolved. After that, NIWA Vessel engaged an independent investigator to carry out a formal investigation into Ms Ashby's allegations of bullying. NIWA Vessel also referred Ms Ashby to Mr Samuels, a clinical psychologist, for him to provide an assessment of how NIWA Vessel might be able to assist her return to work.

[25] In his report dated 30 April 2015, Mr Samuels noted that Ms Ashby:

- (a) did not present with any signs or symptoms of a mental health disorder, and if this had existed, it had been adequately treated;

- (b) presented with no history of any adverse events and was not somebody who was especially vulnerable to distress of events and behaviours;
- (c) was not considered to be impaired or incapable of engaging in employment in any appropriate work environment; and
- (d) required an appropriate return to the work environment, including a return without the Master being present.

[26] He said, however, that if Ms Ashby was required to return to work under the Master, he was unable to predict whether Ms Ashby would be able to withstand any further unprofessional behaviour without it affecting her health and wellbeing. Mr Samuels recommended Ms Ashby be offered counselling as well as EAP services, and that NIWA Vessel nominate a senior colleague with whom Ms Ashby could check in and arrange preparation and/or debriefing meetings.

[27] Mr Samuels noted that the Master had just commenced a period of three months' leave and recorded his confidence that Ms Ashby could successfully return to work. He recommended that NIWA Vessel consider offering a trip or two to Ms Ashby during the Master's absence on leave as this would give both NIWA Vessel and Ms Ashby the opportunity to test how she might cope. This did not happen.

[28] After some delays, the independent investigator investigating Ms Ashby's allegations of bullying issued his report in September 2015. He concluded that the Master's behaviour did not support a finding of bullying (as defined by WorkSafe New Zealand) but that his communication style was very direct, straight to the point and blunt, which may not have suited Ms Ashby. The investigator also noted the Master needed to consider different communication styles and management approaches for different situations and people, and NIWA Vessel needed to provide him with some further training and support in regard to this. The investigator said the Master needed to ensure he remained professional in all his interactions with the crew and consider his tone, demeanour and approach in all his interactions. Further, the investigator said the Master should consider providing more information about decisions and rationale for change, so he got people on board with him and to ensure they did not misunderstand the reasons behind these decisions.

[29] Perhaps surprisingly, the investigator also expressed the view that the relationship between Ms Ashby, the Master and NIWA Vessel was irreparable and suggested NIWA Vessel enter into discussions with a view to exiting Ms Ashby. If those discussions were not successful, the investigator thought NIWA Vessel should consider terminating Ms Ashby's employment on the grounds of incompatibility.

[30] NIWA Vessel then wrote to Ms Ashby on 8 September 2015, requiring her to attend a meeting. It said the purpose of the meeting was to discuss the issues surrounding her absence from work and to gain her response. It referred to the facilitation meeting in November 2014, the psychologist's report and the results of the investigation into the allegations of bullying.

[31] It told Ms Ashby that NIWA Vessel had tried to support her to remedy any concerns she had raised through those processes and that the investigation had

determined that she had not been bullied or harassed. It noted that it had received a further medical certificate, referring to "unresolved and ongoing workplace issues" and that NIWA Vessel felt it had reached a point where it had exhausted the resources available to it to address this situation, including providing her with substantial amounts of sick leave.

[32] It advised that it seemed likely that her relationship with the Master had become irreconcilably incompatible and that the breakdown was substantially attributable to Ms Ashby.

[33] A meeting then took place on 24 September 2015, at which Ms Ashby again requested to be transferred to the second swing shift.

[34] By letter dated 28 September 2015, NIWA Vessel advised that it did not consider a transfer to be a viable option, given that the crew she wished to be transferred to had worked well together for several years and their cook had indicated he did not wish to swap shifts. In those circumstances, NIWA Vessel was proposing to terminate Ms Ashby's employment. NIWA Vessel asked for a response to that letter. On 14 October 2015, after no response was received, NIWA Vessel advised Ms Ashby that her employment was terminated on two months' notice.

[35] As noted, the Authority found that the dismissal of Ms Ashby was unjustifiable. The Authority Member concluded that, although there was a high degree of incompatibility between Ms Ashby and the Master, she was

not satisfied NIWA Vessel had established that the incompatibility was irreconcilable.³

[36] The Authority Member noted that, after Ms Ashby was dismissed, the Master was provided with management training, which Mr Foothead said he had responded to well and his “brash and abrasive approach” had changed so that he had become more mellow in his responses. The Authority Member also found that the problems between Ms Ashby and the Master were not substantially created by Ms Ashby and that the incompatibility was mutual. The Authority Member concluded that Ms Ashby was not treated fairly by NIWA Vessel and that it took insufficient steps to assist

³ *Ashby*, above n 1, at [71] and [83].

Ms Ashby and the Master to repair their relationship until after Ms Ashby had commenced sick leave in September 2014. Even then, the Authority found NIWA Vessel failed to follow the recommendations made in the facilitator’s report and did not follow up Ms Ashby’s complaints about the Master’s conduct at the facilitation meeting. It also failed to follow up the suggestion from Mr Samuels that Ms Ashby return to work while the Master was on leave. Finally, the Authority found that, although the cook on the second swing shift did not wish to swap shifts, there was nothing that prevented NIWA Vessel from making a temporary or permanent swap of shifts.⁴

It is open to parties to just challenge remedies

[37] It is, of course, open to parties to make a non-de novo challenge just on remedies.⁵

[38] The issue in such challenges is whether there is a material error of fact and/or law in the Authority’s determination, relevant to its conclusion as to remedies.

[39] The Court must make its own decision on the matters before it, and on any related issues.⁶ Once it has done so, the determination of the Authority is set aside and the decision of the Court on those matters stands in its place.⁷

In considering remedies the Authority is not limited by the statement of problem

[40] Here, Ms Ashby says the Authority erred in awarding only \$20,000 for distress compensation and in limiting lost wages to three months.

[41] NIWA Vessel, however, submits that the Authority was not able to award Ms Ashby more than \$20,000 for distress compensation because that was all she sought in her statement of problem. Therefore, it is submitted, Ms Ashby’s non-de-

⁴ At [80]-[82].

⁵ See for example *The Board of Trustees of Southland Boys High School v Jackson* [2022] NZEmpC 136; *JCE v Chief Executive of the Department of Corrections* [2020] NZEmpC 46, [2020] ERNZ 92.

⁶ [Employment Relations Act 2000, s 183\(1\)](#).

⁷ [Employment Relations Act 2000, s 183\(2\)](#).

novo challenge does not identify any errors of fact or law in the Authority’s determination on that issue. NIWA Vessel submits that if Ms Ashby had wished the Authority to award more than \$20,000, she should have filed an amended statement of problem in the Authority.

[42] NIWA Vessel relies on the Court of Appeal’s judgment in *McCulloch and Partners v Smith*.⁸ The appeal was from a judgment of the Employment Court in which the Employment Court had awarded a plaintiff \$27,500 even though they had only sought \$15,000 in their statement of claim. The Court of Appeal held that it was not permissible for the Employment Court to award more than had been claimed in a statement of claim. The Court returned the matter to the Employment Court to be reconsidered, with the proviso that the plaintiff could apply to amend their statement of claim, which would allow the Employment Court to grant the full \$27,500.⁹ The Employment Court has since followed *McCulloch*.¹⁰

[43] I do not, however, consider *McCulloch* applies to the Authority. The Authority is not a Court. It is an investigative body that is to resolve employment relationship problems according to the substantial merits of the case, without regard to technicalities.¹¹ The Authority may follow whatever procedure it considers appropriate, provided it complies with the rules of natural justice.¹² The Authority is not bound to treat a matter as being a matter of the type described by the parties and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.¹³ It must act in accordance with equity and good conscience so long as it does not do anything inconsistent with the Act, any regulations made under the Act, or the relevant employment agreement.¹⁴

[44] There is no requirement in the Act or in the [Employment Relations Authority Regulations 2000](#) for an applicant to specify how much compensation they seek.

⁸ *McCulloch and Partners v Smith* CA133/03, 3 December 2003.

⁹ At [3]–[5]. There is no subsequent Employment Court judgment.

¹⁰ *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [72] and [75]; *Cornish Truck & Van Ltd v Gildenhuis* [2019] NZEmpC 6, (2019) 16 NZELR 426 at [56].

¹¹ [Employment Relations Act 2000, s 157\(1\)](#).

¹² [Sections 157\(2\), 160\(1\)\(f\)](#).

¹³ [Section 160\(3\)](#).

¹⁴ [Section 157\(3\)](#).

Applicants often are unrepresented or represented by lay advocates. It is not uncommon for them to simply say they seek lost wages and distress compensation.

[45] A similar issue arose with respect to the Human Rights Review Tribunal (the HRRT) in *Chief Executive of the Ministry of Social Development v Holmes*.¹⁵ The HRRT had awarded the applicant \$17,000 even though the applicant had only sought

\$7,000. On appeal in the High Court, it was submitted, relying on *McCulloch*, that the HRRT could not grant more than the \$7,000 originally claimed.

[46] The High Court acknowledged that there is a general principle in common law courts that you must bring all your claims to court and that you cannot get more than you seek.¹⁶ However, the Court noted the HRRT's special statutory jurisdiction and that neither the [Privacy Act 1993](#) nor the relevant regulations required an applicant to specify the sum of damages sought.¹⁷ The Court agreed with the HRRT's reasoning that the [Privacy Act](#) should be interpreted and applied in a manner that is not legalistic and does not place barriers, especially of a technical nature, between the claimant and a just outcome. The High Court did not think the *McCulloch* decision applied to the facts before it.

[47] It is for similar reasons, I consider the Court of Appeal's decision in *McCulloch* does not apply to the Authority.

[48] Accordingly, provided it complied with the rules of natural justice, it was open to the Authority to award more than the amount claimed in the statement of problem. Therefore, Ms Ashby is entitled to challenge the Authority's decision to grant only

\$20,000 as distress compensation.

Lost remuneration must allow for contingencies

[49] The Authority or Court may, in settling a grievance, provide for the reimbursement of a sum equal to the

whole or any part of the wages or other money

15. *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760.

16 At [105].

17 At [106].

lost by the employee as a result of the grievance.¹⁸ In considering the issue of what lost remuneration is appropriately compensatable, the starting point is [s 128\(2\)](#) of the Act, pursuant to which the Court must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. The Court then has a discretion, pursuant to [s 128\(3\)](#), to order a greater sum by way of compensation for remuneration lost.

[50] The main issue then is what remuneration has been lost as a result of the grievance. That assessment involves a counterfactual analysis; that is, a hypothetical question as to how the employee would have been placed in the absence of the legal wrong. The longer the period in respect of which compensation is sought, the more uncertain and speculative the assumptions underlying the eventual award become. The contingencies (or vicissitudes of life) have to be allowed for.¹⁹

[51] In the Authority, Ms Ashby was awarded 3 months' lost remuneration from 14 December 2015. The Authority did not increase the award beyond the three months as it said there was no guarantee, given Ms Ashby's resolute refusal to work with the Master, that her employment would not have ended within the three months after 14 December 2015 for reasons other than incompatibility.²⁰

[52] Mr Halse, for Ms Ashby, pointed out that Ms Ashby had worked for NIWA Vessel for many years before she was dismissed and suggested she had planned for this to be her job for life.

[53] Ms Shaw, for NIWA Vessel, defended the Authority's assessment of lost remuneration. She said, even if NIWA Vessel had taken the steps the Authority said it could have taken, those would have been attended to in less than three months. She submitted that, at that point, Ms Ashby would have had no justifiable reason not to return to work with the Master, something she was "resolute" she would not do.

¹⁸ [Employment Relations Act 2000, s 123\(1\)\(b\)](#).

19. *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [73]; *Waitakere City Council v Ioane* [2004] NZCA 218; [2004] 2 ERNZ 194 (CA) at [22]- [26]; *Butler v Ohope Chartered Club Inc* [2021] NZEmpC 80, [2021] ERNZ 312 at [24].

²⁰ *Ashby*, above n 1, at [87].

Distress compensation awards are for the effect of the grievance

[54] Distress compensation under [s 123\(1\)\(c\)\(i\)](#) is to compensate the employee for the effect of the grievance. It is payable to the extent the employer's unjustifiable actions caused the distress. The assessment has to be individual; people have differing levels of vulnerability and resilience and the impact on one person may be different from another, depending on those characteristics. The award is not dependent on how egregious the employer's behaviour is; it is not intended to penalise the employer.²¹

[55] The Court must identify what harm was caused to the employee by the unjustifiable action or dismissal and determine what is a fair and just amount for distress compensation in the particular case. In recent times, the Court often refers to the "band" in which the case sits, based on the seriousness of the harm.²²

[56] Here, NIWA Vessel submits that there is very limited evidence that the distress suffered by Ms Ashby was caused by her dismissal. It says that much of the evidence points to matters preceding the dismissal, including the sexual harassment in 2009 and the subsequent alleged bullying by the Master. NIWA Vessel also points to the death of Ms Ashby's father, a subsequent medical misadventure and the employment proceedings as all being matters that occurred after the dismissal and which have contributed to Ms Ashby's current state of mind.

[57] The submissions that Mr Halse made on behalf of Ms Ashby also refer to the history of Ms Ashby's employment, including the sexual harassment and the alleged bullying.

[58] The task then for the Court is to reach an assessment of the distress caused by the unjustifiable dismissal,

comprising the procedure followed by NIWA Vessel leading to the decision to dismiss Ms Ashby, and that dismissal.

21 *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC).

22 *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62]- [66];

Richora Group Ltd v Cheng, above n 10, at [67].

Once compensation has been assessed the Court considers contribution

[59] Once the initial assessment is made on remedies the Court must consider whether a reduction in those remedies is required because the actions of the employee contributed towards the situation that gave rise to the personal grievance.²³

[60] In so doing, the Court must consider causation, proportionality and justice. For conduct to require reduction, it not only must be causative of the outcome; it must also be blameworthy.²⁴

Dismissal was unfair for procedural and substantive reasons

[61] Although the sexual harassment that occurred in 2009 and Ms Ashby's concerns about the Master's subsequent behaviour form part of the background, compensation for those matters is not before the Court.

[62] The process that led to Ms Ashby's dismissal commenced when she raised her concerns about alleged bullying in March 2014 and unsuccessfully sought to be moved to the second swing shift.

[63] It is obvious that the relationship issues were exacerbated by the mistaken release of the 2009 letter in August 2014, with both Ms Ashby and the Master initially understanding that the sexual harassment complaint was being reopened. Ms Ashby again sought a shift change.

[64] Rather than following that path, NIWA Vessel was focussed on trying to repair the relationship between Ms Ashby and the Master and to that end proposed facilitation. Ms Ashby agreed to attend that facilitation, which she did despite her anxiety. The facilitation seems to have had a negative, rather than positive, impact on the situation, but that does not seem to have made NIWA Vessel change course.

[65] Ms Ashby attended mediation with NIWA Vessel and, when asked, went to see the psychologist, Mr Samuels. By September 2015, NIWA Vessel had the

23 [Section 124](#).

24 [Goodfellow v Building Connexion Ltd t/a ITM Building Centre](#) [2010] NZEmpC 82 at [49].

recommendations of the facilitator, which had not been followed up, the report from Mr Samuels that suggested Ms Ashby return to work during a period when the Master was not present, and the report from the independent investigator that noted shortcomings in the Master's communication style.

[66] All those matters should have caused NIWA Vessel to reconsider its position on requiring Ms Ashby to work under the Master. Instead, NIWA Vessel continued to present that as the only available option and, when Ms Ashby would not agree to that course, proceeded to dismiss her.

[67] It seems that NIWA Vessel's process was wrongfooted from the outset. It did not recognise that Ms Ashby had done nothing wrong. It also did not take sufficient account of the intense and isolated work environment of the RV Tangaroa research vessel, or that Ms Ashby would be reporting to the Master. The process was almost entirely premised on Ms Ashby immediately returning to the same crew as, and reporting to, the Master. Although the cook on the second swing shift was asked if he would change shifts, it seems little more was done. Mr Foothed gave evidence that he could not justify a swap based on a personality clash and a communication problem and that it is a "relatively onerous task" to swap crews around.

[68] In the circumstances, NIWA Vessel should have been actively exploring how to have Ms Ashby and the Master on different crews, either by acceding to her repeated requests for a transfer to the second swing shift, or by transferring the Master to that shift. That may have been "relatively onerous," but the path NIWA Vessel took was

more so, and led to Ms Ashby's dismissal.

Ms Ashby may have remained with NIWA Vessel for some time

[69] As noted, I consider that NIWA Vessel should have arranged for Ms Ashby to work on a different shift to the Master. Such a move, properly executed, may well have been successful and led to ongoing employment.

[70] I also take account of Ms Ashby's long service with NIWA Vessel, that she repeatedly has said that she enjoyed the job, including that it was well remunerated,

and that there is no suggestion that prior to 2009 there was any reason for concern about Ms Ashby's health or conduct. It seems she was a diligent and loyal employee.

[71] Against that, I take into account the contingencies of life. I also consider the events that occurred after Ms Ashby left NIWA Vessel.

[72] The evidence on these matters, and on Ms Ashby's employment history, is not entirely clear. It seems she started working part-time in February 2016 and has worked off and on since then, interspersed with periods on a benefit and on ACC, for an unrelated medical misadventure.

[73] There also have been other contributors to Ms Ashby's loss of remuneration, including her anxiety over the Authority and Court proceedings.

[74] On balance, I consider an order should be made that NIWA Vessel pay a sum greater than three months' ordinary time remuneration. An award of 12 months' lost remuneration, from 15 December 2015 to 14 December 2016, is appropriate here. This calculation involves deducting the remuneration Ms Ashby received during that period from the remuneration she would have received had she continued to be employed by NIWA Vessel.

Impact of dismissal was significant

[75] Ms Ashby's evidence, which was supported by Ms Fon, a clinical psychologist who Ms Ashby saw earlier in 2022, demonstrated that she was damaged by the dismissal. NIWA Vessel called evidence from Dr Alberts, a clinical psychologist. Dr Alberts did not meet Ms Ashby, so her evidence was largely general in nature and otherwise based on the documentary evidence, but she also accepted that Ms Ashby's distress was exacerbated by being denied the opportunity to continue to perform in her role due to the repeated dismissal of her requests to change to another shift, and the subsequent termination of her employment.

[76] As noted, it was common ground that Ms Ashby also was impacted by the sexual harassment and the alleged bullying. While those are not matters that are compensatable in these proceedings, they meant that she was in a vulnerable state

when NIWA Vessel dismissed her, which affected the extent of the distress she suffered.

[77] As at March 2014, Ms Ashby was working full-time and, despite her discomfort with working under the Master, was self-managing that situation. Even after her request for a transfer was turned down, she continued to work on the same shift as the Master, apparently raising no concern for NIWA Vessel. The mistaken release of the 2009 letter in August 2014, and hearing about that from the Master, significantly upset Ms Ashby. It led to the further request for a transfer, again declined, and to Ms Ashby commencing sick leave.

[78] Apart from this history, the best evidence of Ms Ashby's state of mind prior to the dismissal is Mr Samuels' report from 30 April 2015.

[79] I acknowledge that Ms Ashby agreed that, when meeting Mr Samuels, she would have been endeavouring to appear positive out of fear that her employment might be terminated for ill-health if she was completely open about her mental state. However, I would expect the psychologist to have been conscious of such a possibility, and taken it into account.²⁵ It would not have greatly diminished the findings that the psychologist reached at the time that included that Ms Ashby was not impaired or incapable of engaging in employment in any appropriate work

environment.

[80] After Ms Ashby was dismissed, she was quite unwell. The health issues that she started suffering after the facilitation meeting continued following the dismissal. Ms Ashby has given evidence of the difficulties that she had with her long-term personal relationship, which broke down following her dismissal.

[81] It seems Ms Ashby's sister had to physically assist Ms Ashby into WINZ to sign her up for the job seeker's benefit, as Ms Ashby was too bereft to do this by herself. Ms Ashby was said to be often tearful and at that stage began isolating herself from others. She went to her general practitioner on multiple occasions.

25. In their evidence both Ms Fon and Dr Alberts discussed situations such as this, and the need for psychologists to be cautious with self-reporting.

[82] While Ms Ashby's distress is a result of a combination of multiple factors, including the Authority and Court proceedings, it is clear that the process followed by NIWA Vessel in 2014 and 2015, and the dismissal itself, were very significant contributors to that distress.

[83] Taking all matters into consideration, I consider an appropriate award for Ms Ashby's distress for the dismissal to be towards the top of the middle band identified by the Court in previous judgments.²⁶ An award of \$35,000 under [s 123\(1\)\(c\)\(i\)](#) of the Act is appropriate.

Ms Ashby was not blameworthy

[84] NIWA Vessel asserts that Ms Ashby contributed to the situation that gave rise to her dismissal such that any compensation awarded to her should be reduced. I do not accept that assertion.

[85] Ms Ashby was not to blame for the sexual harassment that set the whole train of events in motion.

[86] She self-managed her anxiety over continuing to work with the Master for several years, including after he had been promoted to be her manager.

[87] Her responses to NIWA Vessel were constructive in tone. She confirmed that she loved her job and wished to continue with it, but, not unreasonably, sought to be transferred to the second swing shift.

[88] Her distress escalated in 2014 until, after NIWA Vessel sent the letter from 2009 to the Master and others in August 2014 (which I acknowledge was a mistake), she felt unable to undertake sea voyages with the Master. In the circumstances, and bearing in mind Ms Ashby's obligation to take all practicable steps to ensure her own safety at work, and the advice she received from her general practitioner, she cannot be blamed for going on sick leave.²⁷

26 Above n 22.

27. [Health and Safety in Employment Act 1992](#), s 19(a). See also Health and Safety at Work Act 2015, s 45(a), which came into force after the relevant period.

[89] When NIWA Vessel requested she attend facilitation, she did so, despite a high level of anxiety. She also attended and engaged with Mr Samuels.

[90] Mr Foothead suggested NIWA Vessel now had an increased awareness of workplace sexual harassment and bullying. It is, therefore, disappointing to see NIWA Vessel continue to suggest that Ms Ashby's conduct was the problem here. It is not surprising that she and her family felt that she was "treated like a criminal rather than the victim" in this matter.

[91] While it is certainly true that Ms Ashby's dismissal was, in part, as a result of her refusing to return to work on the same shift as the Master, I do not consider that Ms Ashby can be blamed for that. It is clear that she had, by that time, health issues that prevented her from safely working with the Master.

[92] No reduction in remedies is required.

Conclusion on remedies

[93] In conclusion:

(a) Ms Ashby is entitled to 12 months' lost remuneration. I expect the parties will be able to resolve how much Ms Ashby lost in the year following the termination of her employment but, if necessary, they may return to the Court;

(b) She also is entitled to \$35,000 as compensation under s 123(1)(c)(i) of the Act.

[94] Both those sums are to be paid by NIWA Vessel, without deduction, within 28 days of the date of this judgment.

Ms Ashby is entitled to costs

[95] Ms Ashby is entitled to costs. The parties agreed that this matter was appropriately allocated category 2B for costs purposes under the Practice Directions

Guideline Scale.²⁸ Those costs ought to be able to be agreed. If that does not prove possible, Ms Ashby may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. NIWA Vessel is to respond by memorandum filed and served within 14 days thereafter with any reply from Ms Ashby filed and served within a further seven days. Costs then will be determined on the papers.

J C Holden Judge

Judgment signed at 2 pm on 21 September 2022

28 "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

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