

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 51
5311667

BETWEEN

KARL BROWNE
Applicant

AND

TALLEY'S GROUP LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Anjela Sharma, Counsel for Applicant
Gary Barkle, Counsel for Respondent

Investigation Meeting: Held in Nelson
8 December 2010
9 December 2010
10 December 2010
13 December 2010
14 December 2010
28 January 2011

Submissions: 28 January 2011 Applicants' submissions
28 January 2011 Respondent's submissions

Telephone conference: 2 May 2011

Additional information: 2 May 2011 Applicant's information
2 May 2011 Respondent's information

Determination: 6 May 2011

DETERMINATION OF THE AUTHORITY

- A Talley's Group Limited (Talley's) unjustifiably disadvantaged and unjustifiably dismissed Karl Browne. Mr Browne did not contribute towards the situation which gave rise to his personal grievances.**
- B Mr Browne is awarded lost remuneration and lost benefits in an amount to be quantified. Talley's is ordered to pay Mr Browne \$20,000 compensation for his humiliation, loss of dignity, and injury to feelings.**

C Talley's breached its s4(1A)(c) good faith obligations under the Employment Relations Act 2000 ("the Act") and a penalty of \$2,500 has been imposed for this breach.

Employment Relationship Problem

[1] By consent, this matter was heard at the same time as *Damien Burtton v. Talley's Group Limited*.¹ I heard from fifteen witnesses who were all cross examined by opposing counsel and I received nine affidavits by consent. In excess of 350 pages of documents were filed. The respondent's legal name is *Talley's*, not *Talleys*, so references in this determination to *Talley's'* are not errors.

[2] All references to crew refer to crew who are employed by Talley's to work on the *FV Amaltal Enterprise (The Enterprise)*, a deep sea fishing vessel which is at sea for 30-50 days each trip. Because of the type of working environment, and the nature of the allegations and evidence, some witnesses have been referred to by their initials only in order to preserve their privacy.

[3] Mr Browne raised personal grievance claims for unjustified disadvantage and unjustified dismissal. He sought lost remuneration, lost benefits, and compensation for hurt and humiliation and for injury to his reputation.

[4] He also claimed Talley's breached its section 4(1A)(c) duty of good faith under the Act by failing to provide him with all relevant information about its decisions to suspend and dismiss him which deprived him of the opportunity to comment on that information before Talley's made its suspension and dismissal decisions.

[5] Mr Browne sought a \$5,000 penalty for Talley's alleged breach of good faith, which he applied to have paid to him.

[6] Mr Browne was indefinitely suspended without pay on 12 May 2010, which he said was an unjustifiable action which disadvantaged him in his employment.

[7] Mr Browne alleged he had been constructively dismissed because at the conclusion of his disciplinary meeting he was given the option of resigning or being summarily dismissed for drug related serious misconduct. He said he felt he had no option but to resign.

¹ [2011] NZERA Christchurch 52

[8] Talley's accepted Mr Browne was constructively dismissed but said his dismissal was justified because it believed Mr Browne had possessed or used drugs on board *The Enterprise* which had endangered the crew of the vessel. Talley's said it gave Mr Browne the opportunity to resign so it would be easier for him to find a new job.

[9] Talley's said it was contractually entitled to suspend Mr Browne without pay, and his suspension was justified.

[10] Talley's denied breaching its good faith obligations. It said its concerns were made clear to Mr Browne and he was given an opportunity to respond to those concerns before he was suspended and then dismissed.

Relevant facts

[11] Talley's own and operate deep sea fishing vessels. Mr Browne commenced employment with Talley's on 9 July 2009 as a Factory Hand on *The Enterprise*.

[12] Mr Browne was employed on an individual employment agreement dated 1 October 2009 which incorporated the Talley's Standard Terms of Employment on Fishing Vessels dated 1 October 2009 (the standard terms).²

[13] In late 2009, BP spoke to Rebecca Plum Personnel Manager – Talley's Deep Sea Division about concerns BP and her partner ND had regarding drug use on *The Enterprise*. BP and Rebecca Plum are related and Ms Plum said she treated this information as family gossip.

[14] ND is the father of Damien Burtton's girlfriend KP. ND and BP are both employed by Talley's. Mr Burtton and KP worked for Talley's at the time BP discussed her concerns with Ms Plum, but Mr Burtton was summarily dismissed on 25 June 2010 and KP subsequently resigned in support of him.

[15] KD (who worked on *The Enterprise*) also discussed drug use by crew with Ms Plum in late 2009. Ms Plum said she considered this information to be unsubstantiated gossip.

[16] In April 2010, JS, who worked on *The Enterprise*, had a number of casual discussions with Ms Plum during which he referred to drug use by crew. Ms Plum said

² IEA - clause 3.1

she did not think JS was referring to drug use at sea. Around the same time, JS's partner AM, who also worked on *The Enterprise*, expressed concern to Ms Plum about the younger female crew because she had overheard them talking about drugs.

[17] Due to the safety sensitive nature of its operations, Talley's had the contractual right to conduct searches of its vessel, crew and property.³ The standard terms record the employees' consent to searches, including drug dog searches.⁴

[18] As a result of the information given to Ms Plum, Talley's engaged Elite Dog Services Limited (Elite) to undertake drug dog searches on *The Enterprise*. Elite is a private company that owns and operates drug and explosive detector dogs for private industry.

[19] Elite's drug dogs are trained to locate and indicate on the most common drugs available today, including cannabis, cannabis oil, hashish, amphetamines including methamphetamine otherwise known as P, and opiates. The drug dogs detect the presence of substances through their sense of smell, which allows them to detect the presence of a drug in quantities so small they cannot be seen without a microscope.

[20] If the dog smells one of the substances it has been trained to locate it will search for the source of the smell. If it locates the source the dog will indicate that by sitting, which is known as a passive response. If the drug dog can smell a substance, but it cannot get to the item (i.e. find drugs) its body language changes as it continues to try to find the source of the smell.

[21] The dog will act slightly differently in its responses depending on what it smells, i.e. food, another animal, drugs. Whilst the differences in the dog's response may be very slight, if the handler has spent sufficient time with the dog and has closely watched the dog's reactions when detecting in the presence of different items, the handler can be reasonably confident about what type of item (i.e. food, another animal, drugs) has attracted the dog's interest. This is known as *reading your dog*.

[22] A *full indication* means the dog has actually located drugs. An *indication on* means the dog has detected the odour of drugs or the presence of drugs in quantities that

³ Standard terms clause 31.0

⁴ Standard terms clause 31.1

are too small to be seen without a microscope. A *perv* means that dog has detected something other than drugs, such as food or another animal.

[23] Elite undertook two drug dog searches on *The Enterprise* in May 2010.

[24] The first was conducted on 6 May 2010 by dog handler Paul Thomas with a specialist drug dog called Nugget. No drugs were found but Nugget *indicated on* the clothing of LM. When spoken to, LM admitted to smoking cannabis with crew at a pub the previous evening before returning in the early hours of the morning to the vessel to sleep.

[25] The second search was undertaken on 12 May 2010 by dog handler Peter White with specialist drug dog Max. No drugs were found but Max *indicated on* the bags of six crew; Mr Browne, Mr Burton, JM, DT, JH, and MS.

[26] These six crew members were spoken to by Mr White in their cabins to see if they could explain the dog's interest in their bags. Five of the six crew denied knowing why Max had indicated on their bags. MS admitted smoking cannabis a week or so earlier whilst on shore during her trip off. All crew gave permission to Mr White to search their bags and although he conducted a thorough search of the bags, no drugs or drug related paraphernalia were found.

[27] Max was an experienced drug dog and Elite considered him to be its top dog. Mr White was an experienced dog handler who had worked closely with Max for two years. Given Max's training and experience and Mr White's close association with him, Mr White considered it likely Max's indication on the bags was drug related, as opposed to a *perv* on food or another animal.

[28] Drug dogs do not distinguish between different types of drugs, so an indication on a bag does not assist in determining what type of drug the dog has detected. Nor does the dog's indication on a bag provide any information about how recently that bag may have had contact with drugs, or what the nature of that contact may have been.

[29] The dog's indication on a bag did not necessarily mean the bag had contained drugs. It could have just been touched by someone who had been in contact with drugs or it may have contained property or clothing which had picked up a drugs odour from somewhere.

[30] For example, if a non drug user was in a room where cannabis was being smoked and they subsequently put a jersey they had been wearing when others in the room were using cannabis on or into a bag, the drug dog could indicate on the bag, despite the jersey wearer never having used or possessed drugs. Mr White's evidence was that if a taxi driver, airport baggage handler, bus driver, or any other person had been in contact with drugs and had then touched the bag, Max could have detected that.

[31] After Mr White had finished individually questioning the six crew in their cabins, they were taken off the vessel for further interviews on land. MS was interviewed by Ms Plum in her office. There is a conflict of evidence over what, if anything, MS disclosed about drug use on *The Enterprise*, which I discuss in detail later. No notes were taken of the interview and there is no written record of what was discussed.

[32] Mr Smith Operations Manager Talley's Deep Sea Division engaged Derek Milne, a licensed private investigator in practice as Tasman Investigations Limited to investigate Talley's concerns about drug use on *The Enterprise*. Prior to starting Tasman Investigations Limited in 2001, Mr Milne was employed by NZ Police for 18 years, with the majority of his service being in the Criminal Investigation Branch (CIB).

[33] Mr Milne interviewed Mr Browne, Mr Burton, JM, JH and DT were interviewed in Mr Smith's office on 12 May 2010. During these interviews Mr Smith sat at his desk approximately four metres away from Mr Milne who was at a table in the same room. Mr Smith worked on his computer whilst Mr Milne spoke to the crew individually at the table.

[34] Mr Smith said he jotted a few rough notes based on bits and pieces he overheard, but he was not focused on the interviews and he was not acting as a note taker. Mr Milne did not take notes but he did record who he had interviewed in his job sheet for 12 May 2010.

[35] Mr Milne formed an adverse view of Mr Browne, which he shared with Mr Smith. Mr Smith then conveyed Mr Milne's adverse view of Mr Browne to Mr Hazlett, General Manager Talley's Deep Sea Division. Mr Smith also told Mr Hazlett he shared Mr Milne's adverse view of Mr Browne.

[36] Mr Smith recommended to Mr Hazlett that Mr Browne and JM be suspended. As a result of that recommendation Mr Browne and JM were called together to meet with

Mr Hazlett, with Ms Plum present, during which they were indefinitely suspended without pay. Mr Burton, DT, JH, and MS all returned to *The Enterprise*.

[37] Mr Burton called Mr Browne and JM after they had been suspended and as they were travelling by car to JM's house because he wanted to know why they had not returned to the vessel. Talley's said the mother of N (who was JM's girlfriend) told them Mr Browne's call was threatening, however this was strongly denied by her. Mr Burton, Mr Browne, and JM also all denied the call was in any way threatening. I address this conflict later.

[38] Mr Milne interviewed DT, WS, DA, and CM (all crew), on the morning of 13 May 2010 but none of these witnesses said anything relevant. All denied knowledge of drug use on the vessel. Mr Milne made some brief notes of these interviews.

[39] Because Talley's were concerned about Mr Burton's call, Mr Milne, accompanied by Mr Smith, re-interviewed Mr Burton on the afternoon of 13 May 2010. That resulted in Mr Smith indefinitely suspending Mr Burton without pay.

[40] Mr Milne completed his interviews with crew on 19 May 2010 when he interviewed KP and BW, neither of whom provided any relevant information. Mr Milne submitted his written report to Mr Hazlett on 24 May 2010.

[41] Mr Milne did not interview BP, ND, KD, JS, AM, LM, or MS who were all people Talley's believed had disclosed personal knowledge of drug use on the vessel. Nor did he interview DH, TS, MJ, NW or GL who were crew LM named as having smoked cannabis with him on the evening of 5 May 2010.

[42] Mr Milne also failed to interview CM who LM had named as a regular cannabis user. LM had also identified DT as a regular cannabis user and although Mr Milne did interview DT after Max indicated on DT's bag, Mr Milne did not ask DT any questions about LM's disclosure.

[43] For the first week of his suspension Mr Browne stayed with JM, who lived with his gravely ill girlfriend N. N could not work because of her illness so JM supported her financially. JM and N were already under considerable stress because of her very serious ill health, and JM's unpaid suspension put them under even more pressure.

[44] Mr Browne did not know JM very well and he had never met N. Mr Browne stayed with JM and N for the first week of his suspension because he had nowhere else to stay in Nelson and without an income he could not afford to rent accommodation. He stayed in Nelson for a week because his suspension letter incorrectly implied Talley's investigation would be completed in a week, so Mr Browne was trying to avoid the cost of return airfares back to Auckland, which is where he was based when he was not on *The Enterprise*. At the end of the first week, Mr Browne returned to Auckland where his mother and step father financially supported him.

[45] Whilst on suspension Mr Browne phoned Talley's at least twice to find out what was happening with its investigation and his suspension. He was told by Ms Plum that she did not know anything, and he was not given any information. The only contact Talley's had with Mr Browne during his suspension was when it sent him a disciplinary letter dated 11 June 2010.

[46] Mr Browne instructed Ms Sharma, who was also representing Mr Burton and JM, to represent him. Ms Sharma wrote to Talley's on 17 June 2010 asking for specific details of the disciplinary allegations and for access to relevant information. She followed her letter up with an email and a phone call, but did not get any response from Talley's.

[47] Mr Browne travelled to Nelson with his step father Kim Froude on the evening of 17 June 2010. After arriving in Nelson they discovered Talley's had adjourned their disciplinary meeting. They went to Talley's on the morning of 18 June 2010 and, for reasons I discuss later, Mr Browne ended up having his disciplinary meeting without his representative present.

[48] Talley's gave Mr Browne the option of resigning or being dismissed for serious drug related misconduct and Mr Browne said he reluctantly resigned because he believed he had no other option.

Conflicts of evidence

[49] There were two critical conflicts of evidence to be resolved.

Ms Plum and LM meeting on 6 May 2010

[50] The first conflict was between Ms Plum and LM over his alleged naming of crew who had used drugs and in particular P on board the vessel.

[51] Ms Plum said she met LM on 6 May 2010 to discuss his admission of cannabis use. LM denied meeting her at all.

[52] Ms Plum said that during her meeting with LM he named five crew; DH, TS, MJ, NW, and GL as having smoked cannabis with him and four crew; Mr Browne, Mr Burton, JM, and DT as P users. LM also stated that DT and CM were regular cannabis users.

[53] LM denied any knowledge of P use by crew and denied ever making the disclosures Ms Plum attributed to him. LM said Ms Plum's evidence was fabricated.

[54] Because LM's evidence was critical to Talley's case against Mr Browne, I have set out the relevant part of Ms Plum's notes which were recorded immediately after she met LM:

[...][LM] admitted he had smoked marijuana the night before. He said he was drunk, the crew were at the Wakatu [pub] sitting outside and a joint was passed around.

[LM] said he'd only been to two 'crew piss ups' and he'd witnessed drug use at both of them.

I asked [LM] who was in the group when the joint was being passed around, who was smoking it. He listed [DH], [TS], [MJ], [NW], and [GL].

I asked [LM] if he thought there was any regular users amongst the crew. [LM] suggested [CM] and [DT].

I asked [LM] if he was aware of P being used by the crew. [LM] became a little bit uneasy and asked if the information he gave me would be kept confidential. I assured him it would. I also pointed out we had been told by others that there was P being used by Enterprise crew.

I asked if it was just a recreational thing during turnarounds. [LM] hesitated then unconvincingly agreed.

So I asked him if he knew of it being used at sea. [LM] told me he had witnessed P being used on the vessel. He gave me the names of Karl Browne, [DT], Damien Burton, and [JM].

I asked how they were getting away with it, how it was not being detected.

[LM] told me that Karl Browne would often start shift looking very tired, then would head down to the meal plant smoke some P and 'be charging for the rest of the shift'. He said his eyeballs would often be "popping out of his skull". [...]

[55] The notes from LM's disciplinary meeting on 18 June 2010 records the following exchange where Mr Hazlett questioned LM about his disclosure to Ms Plum on 6 May 2010:

TH - There were some crew using P on board that you told Rebecca [Ms Plum] about – can you tell us more about how they are doing it?

LM – 100% certain they are using it at sea.

LM's father – How do they use it, is it only hearsay?

LM – You can tell those people are using it, they are high as for the whole shift.

[56] The quote above was the full exchange between Mr Hazlett and LM regarding the disclosures in Ms Plum's notes of 6 May 2010.

[57] I have resolved this conflict in favour of Ms Plum's version of events for the following reasons:

- Ms Plum made contemporaneous notes of her meeting with LM;
- Ms Plum's notes were dated and the time of the meeting was recorded;
- It was highly unlikely Talley's would not have spoken to LM about the drug dog indication and his admission of cannabis use;
- The language used in the notes was consistent with the way LM spoke whilst giving evidence, which gave Ms Plum's notes a ring of authenticity;
- Ms Plum's actions immediately after meeting LM corroborated the fact that LM had disclosed drug use because she emailed Mr Hazlett at 2pm on 6 May 2010 and said *I need to talk to you about P being used on the Enterprise*;
- Ms Plum was able to give detailed evidence about her meeting with LM, which included describing where they each sat, the matters discussed, and LM's demeanour and attitude in response to specific questions;

- Ms Plum's note recorded information, such as where LM had been the previous evening and who he had been with, that was not within her knowledge and which she could only have got from LM;
- Ms Plum did not have any reason to make up her conversation with LM. Quite the contrary, the disclosure increased work for her at a time when she was already busy;
- Talley's did not want to lose crew because it was expensive, time consuming, and inconvenient to replace them, so it did not have a motive to fabricate allegations that potentially put the jobs of eleven crew in jeopardy;
- Ms Plum did not have any previous or personal issues with Mr Browne, or any of the other crew named in her notes, so there was no reason why she would have fabricated evidence against them. I consider it more likely the crew recorded in Ms Plum's notes were named by LM;
- LM was an unconvincing witness. He gave his evidence with bravado which included swearing, burping, and swinging on his chair;
- By providing names, LM had informed on his fellow crew which a number of witnesses (including LM) agreed would have been likely to have caused problems for him if he went back to sea. LM therefore had a compelling reason to distance himself from the drug use disclosures Ms Plum attributed to him;
- LM was 18 years old. His father described him as easily led and influenced by peer pressure. Despite not having anything to do with either Mr Browne or Mr Burton previously, after they were dismissed LM suggested they had drinks together and he friended Mr Burton on Facebook. This suggested LM was keen to be seen in a good light by them, which I consider may have influenced his evidence;
- LM's evidence was demonstratively incorrect in some respects because he denied receiving and having telephone calls with Ms Plum when phone records established such calls took place;

- During his disciplinary meeting LM did not deny disclosing P use by crew to Ms Plum, which would have been the logical reaction if he had never met Ms Plum or made such a disclosure. Instead the notes record LM confirmed he was aware of P use by crew at sea which was consistent with Ms Plum's notes.

MS's alleged disclosure of drug use by Mr Browne

[58] The next conflict was over whether MS had named Mr Browne as someone she knew had used or was using P on board *The Enterprise*. Ms Plum said she had, whilst MS adamantly denied she had ever named anyone, including Mr Browne, as a drug or P user.

[59] As a result of Max indicating on her bag, MS was spoken to in her cabin by Mr White with Ms Plum present. Mr White admitted he did not have a clear recollection of his conversation with MS and his witness statement did not mention MS's alleged disclosure about Mr Browne.

[60] Mr White's evidence to me was equivocal. He said:

I recall a conversation [in MS's cabin] where Karl's name was put up, but I have no specific recollection of the conversation or context and I can't recall exactly what was said.

[61] I put relevant paragraphs of MS's witness statement to Mr White to comment on and consider it significant he did not contradict MS's statement *I do not believe I mentioned Karl's name*.

[62] Mr White recalled MS acknowledging she had heard rumours about drugs and in particular P on *The Enterprise* but he did not link that disclosure to Mr Browne's name having being mentioned. Mr White was not clear on who had used Mr Browne's name, with there being some suggestion it could possibly have been mentioned by him.

[63] Mr White submitted his report to Mr Smith the same day as the drug search. This summarised the information obtained from the search and named the crew Max had indicated on. However, Mr White's report did not record Max's indication on MS's bags. MS was not mentioned in the report at all and there was no reference to her having named Mr Browne as a P user or someone who had used or was using P on the vessel.

[64] Neither Ms Plum nor Mr White made any notes of the discussion with MS in her cabin and there is no other document (apart from a vague mention in Mr Milne's report) which records the detail of MS's alleged disclosure about Mr Browne.

[65] MS's account of her questioning by Mr White was that he asked her if she knew anything about drugs on board the vessel, and she agreed she had heard rumours. As an aside, MS told me what these rumours were, and they did not involve Mr Browne.

[66] Ms Said Mr White asked her if she knew of anyone using drugs on board, and she told him she did not. I asked MS if it was possible she had forgotten she had named Mr Browne. MS reiterated that she had not named Mr Browne, she was very firm about that in her evidence. Ms Said she had no personal knowledge of drug use by crew, so would not have been able to name anyone. Ms Said she had admitted to hearing general rumours of drug use on board but that was it.

[67] When asked if she recalled Mr Browne's name being mentioned at all, Ms Said that when they were in Ms Plum's office, Ms Plum asked her if she was surprised the dog had implicated Mr Browne. Ms Said she told Ms Plum she was not, but she was not asked why she had said that.

[68] Ms Plum's evidence was that when Mr White asked MS if she knew of anyone using P on board, MS named Mr Browne. Ms Plum did not provide any context around MS's alleged disclosure, as she had done with LM's disclosure.

[69] Ms Plum told me MS was *quite afraid which was why she had now denied naming Mr Browne*. Further questioning uncovered that Ms Plum had no personal knowledge of MS's alleged fear, which had apparently been reported to her by *The Enterprise* Skipper, Lee Dodunski. Ms Plum told me Mr Dodunski told her MS was very fearful and had cried when told she was required to provide a witness statement.

[70] Mr Dodunski provided an affidavit, consistent with MS's evidence, but conflicting with Ms Plum's evidence. He denied MS had been scared or tearful when asked to provide a witness statement.

[71] MS openly rubbished claims she was fearful and laughed scathingly at the suggestion she was afraid. MS presented as a strong opinionated character. She did not seem the least bit intimidated or fearful and I accept her evidence she was not worried about her involvement in this matter.

[72] The Authority's task is to determine what happened by reference to the balance of probabilities from an objective perspective. I consider it likely Ms Plum was mistaken and MS did not name Mr Browne as a P user on *The Enterprise*. I consider it more likely MS just said (in response to a question from Ms Plum) she was not surprised the dog had indicated on Mr Browne, which Ms Plum then incorrectly interpreted as a disclosure by MS of Mr Browne's alleged P use at sea.

[73] Mr White had spoken to Mr Browne on 12 May 2010 which would explain his recollection of Mr Browne's name being mentioned. If MS had named Mr Browne as a P user at sea, it would have been the only name Mr White had been given after speaking to six crew members, so I would have expected him to clearly recall such a significant disclosure and to have fully and properly recorded it in his report.

[74] If MS had disclosed P use by Mr Browne to Mr White, I would have expected him to have asked MS follow up questions to establish what her disclosure was based on, but that did not occur. If MS had named Mr Browne, I would have expected Ms Plum to have interviewed her about her alleged disclosure when they returned to her office, but that did not occur.

[75] Ms Plum was aware of LM having named Mr Browne as using P at sea the previous week, so it would make sense for her to have specifically asked MS about Mr Browne. MS's expressed lack of surprise is vague, which is consistent with Mr Milne's vague and non specific note that MS had implicated Mr Browne.

[76] The only written reference to MS's alleged disclosure about Mr Browne is by Mr Milne. His job sheet for 12 May 2010 recorded *Rebecca speaks to [MS]: implicates Karl Browne* and his report of 24 May 2010 stated [...] *a female crew member spoken to has implicated Mr Browne as being involved in the use of drugs on board the vessel*. Mr Milne must have got that information from Ms Plum, because he did not interview MS and did not have contact with Mr White.

[77] I consider Mr Milne's references to MS are likely to accurately reflect the information Ms Plum passed on to him. I do not consider Mr Milne's record goes as far as Ms Plum's evidence did about MS's alleged disclosure. If Ms Plum told Mr Milne MS had disclosed she knew of, or had seen, Mr Browne using P on the vessel, Mr Milne, with his extensive prior experience in the CIB, would have been likely to have fully recorded that disclosure. Mr Milne had not got anywhere with his inquiries, so I expect he would

have wanted to have interviewed MS if she had disclosed direct knowledge of P use at sea, but he made no attempt to do so.

[78] Mr Hazlett said he spoke to Mr White some time after 12 May 2010 (he could not remember when) about the search. If MS had disclosed drug use by Mr Browne at sea that would have been the most significant information to have come out of Mr White's search, so he would have been likely to have mentioned it to Mr Hazlett. When they met. There was no evidence he did.

Issues

[79] The issues for the Authority to determine include:

- Was Mr Browne's suspension justified?
- Was Mr Browne's dismissal justified?
- If Mr Browne has personal grievances what (if any) remedies should be awarded?

Was Mr Browne's suspension justified?

[80] The statutory duty of good faith requires an employer contemplating possible suspension of an employee to be active and constructive, responsive and communicative.⁵

[81] An employer contemplating suspending an employee, against whom serious misconduct has been alleged, will normally be required to tell the employee of the possibility of suspension, explain the grounds for the proposed suspension, and offer the employee an opportunity to persuade them not to suspend. It will be relatively rare for an employer to be justified in unilaterally suspending without advice to, or input from, the affected employee.⁶

[82] It is well established that suspension of an employee from employment is a disadvantageous action so far as the employee is concerned.⁷ Talley's bear the onus of justifying its action. Whether Mr Browne's unpaid indefinite suspension was justified must be determined on an objective basis, by considering whether Talley's actions and

⁵ s.4(1A)(b) ERA

⁶ *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178

⁷ *Ibid* 6

how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time Mr Browne was suspended.⁸

[83] The Authority is required to objectively review all of Talley's actions and assess those actions against the test of what a fair and reasonable employer would have done.⁹ The standard is what the Authority concludes a fair and reasonable employer in Talley's circumstances would have decided and how those decisions would have been made.¹⁰

[84] A fair and reasonable employer would have good reasons for indefinitely suspending an employee and it would have followed a fair process, consistent with good faith and natural justice requirements, before doing so. Alternatives to unpaid suspension and the length of the suspension would be carefully considered before an indefinite unpaid suspension was imposed on an employee.

[85] Once the employee had been indefinitely suspended without pay, a fair and reasonable employer would have promptly progressed its investigation so the employee was suspended for no longer than was necessary. It would also have kept the unpaid suspension under review and it would have responded to the employee's requests for information about their suspension.

[86] Talley's was contractually entitled under its standard terms to *suspend an employee without pay while investigating and processing any complaint of misconduct*.¹¹ It was investigating serious allegations of drug use at sea, on a vessel which was due to sail on a six week deep sea voyage two days later. On the face of it Talley's would have had a good reason for suspending Mr Browne on pay for a short period while it promptly investigated its concerns. But that is not what it did.

[87] On 12 May 2010 Mr Hazlett removed Mr Browne from *The Enterprise* and indefinitely suspended him without pay. Mr Browne's suspension was never reviewed so he remained suspended without pay until the disciplinary meeting on 18 June 2010 resulted in his forced resignation. Mr Browne's attempts to get information about his situation were ignored and, apart from sending a disciplinary letter, Talley's had no contact with him after he was suspended.

⁸ s.103A ERA

⁹ *Air NZ v V* [2009] ERNZ 185

¹⁰ *Ibid* 9

¹¹ Standard Terms - clause 28.3

[88] Talley's actions and how it acted in connection with Mr Browne's suspension were not what a fair and reasonable employer would have done in the circumstances. Mr Hazlett did not consider options other than suspension without pay, he did not consider how long the suspension should be for, and he did not give Mr Browne a real or genuine opportunity to be heard before he was suspended.

[89] Mr Hazlett had a lot of prejudicial information which was not disclosed to Mr Browne, who never knew JS, AM, KD, BP and ND had all expressed concern about drug use on *The Enterprise*. Mr Browne was completely unaware LM had named him as a P user, and he never saw a copy of Ms Plum's notes of her meeting with LM. Mr Browne was not told Mr Milne had formed an unfavourable view of him during their interview or why he had done so, or that Mr Milne's view was shared by Mr Smith, or why he did so.

[90] I find all this information was likely to have influenced Mr Hazlett's suspension decision, so it should have been disclosed to Mr Browne to comment on. Failure to do so was in breach of Talley's s4(1A)(c) duty of good faith under the Act which required it to provide Mr Browne with access to information relevant to his suspension and an opportunity to comment on it before the decision was made to suspend him.

[91] Mr Browne was deprived of a real opportunity to persuade Mr Hazlett against suspending him without pay because he did not know what that decision was based on. Even if he had known, Mr Hazlett met with Mr Browne and JM together to suspend them, depriving them of privacy to discuss their personal situations with him. Both of them had personal circumstances which were relevant to consideration of whether suspension should be paid or unpaid and to how long any suspension should be for, however Mr Hazlett did not obtain and therefore could not have considered this relevant information.

[92] There was no good reason for Mr Browne to have been suspended indefinitely. The nature and length of the investigation into its concerns was entirely within Talley's control. It could have directed Mr Milne to complete his investigation and report back within a specific time period, but it did not.

[93] Mr Milne finished interviewing crew by 19 May 2010 and he provided his report on 21 May 2010. Mr Browne's unpaid suspension for five weeks (12 May – 18 June

2010) was longer than was necessary and Mr Hazlett admitted it went on too long. He also admitted Talley's lack of communication with Mr Browne was *not good*.

[94] The explanation Mr Hazlett gave for suspending Mr Browne and JM was unsatisfactory. He said *we heard people naming them as P users, using P to sleep with people and we had the dog* indication. Talley's never had any evidence alleging Mr Browne or JM had used P to sleep with people, so it was unfair and misleading for him to suggest it did.

[95] This was untrue but highly prejudicial irrelevant information Mr Hazlett should not have taken into account. A fair and reasonable employer would have ensured the information it relied on when deciding whether to suspend actually related to the employee(s) it was proposing to suspend.

[96] As the decision maker Mr Hazlett was responsible for ensuring he properly considered relevant information before deciding to suspend. Ensuring consistency of treatment of crew in a similar situation to Mr Browne was a factor Mr Hazlett should have, but did not consider. Either crew should have been treated consistently or where there was disparity of treatment, there should have been good reasons for the disparity.

[97] Mr Hazlett's explanation for Mr Burtton, DT, JH, and Ms Being allowed to return to the vessel on 12 May 2010 when Mr Browne and JM were indefinitely suspended without pay was that Mr Smith had only recommended Mr Browne and JM be suspended. Mr Browne was clearly treated differently from other crew who were in a similar situation to him.

[98] Mr Hazlett did not know enough about the circumstances of the other crew to be able to explain to me why they were allowed back on the vessel. That is information he should have, but did not, consider when suspending Mr Browne. Accordingly, Mr Hazlett was unable to satisfy me he had good reasons for treating Mr Browne differently.

[99] Mr Browne was not given an opportunity to take advice or be accompanied by a representative or support person before he was indefinitely suspended without pay. Because an indefinite unpaid suspension was such a draconian action, a fair and reasonable employer would have ensured Mr Browne had an opportunity to be represented before a final decision to suspend him indefinitely without pay was made.

[100] There were a number of options available to Mr Hazlett which he should have, but did not, consider. He could have asked Mr Browne to stay off the vessel voluntarily until he had taken advice and a meeting was held to discuss his proposed suspension. He could have explained the grounds for the proposed suspension to Mr Browne on 12 May 2010, and then scheduled a meeting on 13 May 2010 to discuss it, so Mr Browne had an opportunity to take advice and prepare his response. He could have suspended Mr Browne on pay until he had a reasonable opportunity to take advice and then reviewed the suspension at that time. Mr Hazlett could also have suspended Mr Browne overnight without pay until he had taken advice and then reviewed his unpaid suspension when Mr Browne was represented.

[101] A fair and reasonable employer in Talley's position would not have acted as it did, and would not have taken the actions it took, in respect of Mr Browne's suspension. I find Mr Browne's suspension from 12 May to 18 June 2010 was an unjustified disadvantage personal grievance in that, without justification, Talley's affected his employment, or one or more of the terms of it, to his disadvantage by unjustifiable action.

Was Mr Browne's dismissal justified?

[102] It is for Talley's to justify Mr Browne's dismissal. Justification is to be objectively assessed in light of the justification test in section 103A of the Act. Compliance with statutory good faith and contractual obligations is relevant to that assessment.¹²

[103] Under the Act, the duty of good faith is wider than the implied mutual obligations of trust and confidence.¹³ It requires parties to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative.¹⁴

[104] An employer which is making a decision that may impact on an employee's ongoing employment is required to give that employee access to information relevant to its decision, and an opportunity to comment on it, before a final decision is made.¹⁵

¹² *X v ADHB* [2007] ERNZ 66

¹³ s.4(1A)(a) ERA

¹⁴ s.4(1A)(b) ERA

¹⁵ s.4(1A)(c) ERA

[105] The Authority's inquiry into Mr Browne's dismissal grievance is not to determine whether or not he used P on *The Enterprise* or endangered the crew, (although once personal grievances are established that would be relevant to the issue of contribution). Rather the Authority is required to determine whether Talley's conducted a full and fair inquiry into its concerns, and whether as a result of those inquiries Mr Hazlett had reasonable grounds to believe, and did honestly believe, Mr Browne had engaged in misconduct which was sufficiently serious to warrant dismissal.¹⁶

[106] In reviewing whether Mr Hazlett had reasonable grounds to believe serious misconduct had occurred, the Authority's focus is upon Talley's actions and how it acted. The Authority must be satisfied that in reaching its decision to dismiss Mr Browne, Talley's adopted a logical chain of reasoning, which is transparent and reasonable from the facts uncovered during its investigation and presented to it.¹⁷

[107] As the Court of Appeal stated in *Airline Stewards and Hostesses of NZ IUOW v. Air New Zealand Limited*¹⁸:

What are reasonable grounds for a belief of serious misconduct depends on the facts of a particular case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable inquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

[108] The Employment Court has made it clear that section 103A requires the Authority to objectively review all of the employer's actions up to and including its decision to dismiss.¹⁹

Contractual terms

[109] The starting point is the parties' contractual terms, because these identify the standard Talley's set itself.

[110] Clause 29.1.1 of the standard terms relate to serious misconduct and state:

In the event of an allegation of serious misconduct against an employee, the company will advise the employee of the allegation and all information it has relating to that allegation and shall advise the

¹⁶ *C v Air NZ Ltd* [2011] NZEMPC 27

¹⁷ *Ibid* 16

¹⁸ [2006] ERNZ 415

¹⁹ *Ibid* 9

employee that if the company finds that such misconduct occurred then the employee will or maybe dismissed. (emphasis added)

The employee shall be requested to reply to the allegations made against him/her and, if the employee so wishes, the employee shall be given an opportunity to consider the matters raised and obtain representation.

The company shall fairly hear and consider the employee's reply before making a determination of the matter.

[111] Clause 30.0 of the standard terms deals with dismissal offences. Clause 30.1 sets out examples of offences which may result in summary dismissal. This includes:

Detection or knowledge of drugs/substance abuse. (The company reserves the right to request drug tests). This also means the persons acting as lookouts and/or observing and not reporting the same.

[112] Talley's breached its contractual obligations because it did not provide Mr Browne with *all information [...] relating to the allegations* against him.

Talley's allegations

[113] On 11 June 2010 Talley's sent Mr Browne a letter which stated:

[...] You are required to attend a disciplinary meeting to respond to the following allegations of misconduct.

*Possession or use of drugs;
Endangering crew of vessel.*

The policy or work rule that has been breached is Standard Terms of Employment on Fishing Vessels Clauses 7 and 30.1.

If the allegations are found to have substance, the most serious action that could be taken against you is a final warning or dismissal. [...]

[114] Clause 7 dealt with drugs and alcohol testing and clause 30.1 listed dismissal offences.

[115] No information was provided with the disciplinary letter.

[116] It is a minimum requirement of procedural fairness for an employee to be given notice of specific allegations of misconduct.²⁰ Mr Hazlett accepted that the allegations put to Mr Browne were vague and non specific. He said both allegations were effectively

²⁰ *Affco NZ Ltd v Nepia & Morunga* 28 Sept 2007, Shaw J, WC25/07; *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35

the same and relied on exactly the same information because if an employee used drugs at sea they endangered the crew and vessel. I find that explanation could not have been gleaned from Talley's disciplinary letter.

[117] The allegations did not contain basic information such as what drug(s) Mr Browne was alleged to have possessed or used, when and where he was said to have possessed or used drugs, or what information or evidence the allegation was based on. Likewise there was no information about which crew he had allegedly endangered on which vessel or how and when that had occurred, or about the information that allegation was based on.

[118] Ms Sharma had asked for this information a number of times, so Talley's should not have held a disciplinary meeting until it had provided Mr Browne with specific details of its allegations and all information relevant to the allegations.

Breach of good faith

[119] By the time of Mr Browne's disciplinary meeting Mr Hazlett had the following information:

- Ms Plum's verbal report of KD's comments that she was concerned about drug use on *The Enterprise*;
- Ms Plum's verbal report that in late 2009 and April 2010 JS had expressed concern about drug use by crew;
- Ms Plum's verbal report that AM had overheard drug related conversations by young female crew;
- Interview by him of JS (date and content unknown) in which JS confirmed he was aware of drug use on *The Enterprise*;
- Ms Plum's verbal report that BP's hearsay information that BP and ND were concerned about drug use by crew;
- His interview with BP (date unknown and content unknown);
- Notes of Ms Plum's interview with LM on 6 May 2010;

- Information provided by LM during his disciplinary meeting held on 18 June 2010 prior to Mr Browne's disciplinary meeting;
- Ms Plum's verbal advice that MS had named Mr Browne as someone who allegedly used P on *The Enterprise*;
- Mr White's written report dated 12 May 2010;
- His discussion with Mr White (date unknown) about the search;
- Mr Milne's written report dated 24 May 2010;
- Mr Smith's verbal advice that Mr Burtton had stored Mr Browne's name in his mobile phone contacts as *Karl Crackie*;
- Mr Smith's verbal report of Mr Milne's negative view of Mr Browne as a result of his interview on 12 May 2010;
- Mr Smith's verbal report of his own unfavourable view of Mr Browne as a result of Mr Milne's interview on 12 May 2010;
- Mr Smith's verbal report to Mr Hazlett on Mr Milne's interviews with crew;
- Mr Smith's verbal advice that Christine Bellamy had overheard a threatening phone call from Mr Burtton to Mr Browne and JM on the afternoon of 12 May 2010;
- Mr Hazlett's interviews (dates and content unknown) with Lee Dodunski, Eru Puata and possibly other crew whose names he now cannot recall.
- Mr Smith's verbal report of his and Mr Milne's interview with Damien Burtton on 13 May 2010 which had included discussion of Mr Browne.

[120] All of this information influenced Mr Hazlett's decision about Mr Browne's ongoing employment, so it should have been provided to Mr Browne to comment on before Mr Hazlett decided to dismiss him. Talley's did not disclose any information at all to Mr Browne in advance of his disciplinary meeting. All he had was the disciplinary letter.

[121] Talley's breached its section 4(1A)(c) good faith obligations under the Act because it did not provide Mr Browne with access to information relevant to its consideration of his ongoing employment or an opportunity to comment on it before he was dismissed.

Late adjournment of disciplinary meeting

[122] Talley's sent the disciplinary letter to Mr Browne in Auckland so it knew he would have to travel to Nelson to attend the disciplinary meeting scheduled for 10am on Friday, 18 June 2010. Talley's had scheduled four separate disciplinary meetings for LM, Mr Browne, Mr Burtton and JM over the course of 18 June 2010.

[123] At 4.16pm on 17 June 2010 Ms Plum sent an email to Ms Sharma saying the disciplinary meetings for Mr Browne, Mr Burtton and JM had been adjourned because Mr Hazlett and Talley's solicitor, Graeme Malone were not going to be available. LM was unrepresented and Talley's did not adjourn his disciplinary meeting which had been scheduled for 8am on 18 June 2010.

[124] Mr Hazlett first told me the meeting was adjourned because Mr Malone was not available. Later in his evidence Mr Hazlett told me he got Ms Plum to adjourn the disciplinary meetings on 17 June 2010 because Ms Sharma had been chasing a response to her requests for information throughout the day and they did not have time to answer her before the disciplinary meetings.

[125] As it turned out, Mr Hazlett and Mr Malone were both available to meet on 18 June 2010.

[126] Ms Sharma advised Mr Burtton and JM of the adjournment but because Mr Browne was already in transit, she could not contact him. Mr Browne and his step father Kim Froude travelled from Auckland to Nelson with a transit in Wellington, so did not arrive in Nelson until 20.00pm on 17 June 2010. Mr Burtton told them after they had arrived that Mr Browne's meeting had been adjourned.

[127] This created a problem for Mr Browne. He and Mr Froude had flights back to Auckland at 3pm on Friday, 18 June 2010. They could not afford another return trip to Nelson. Mr Browne had been without pay for five weeks and Mr Froude's sole income was supporting their household, which had already put their family under significant

financial pressure. Mr Froude could not stay in Nelson for the weekend because he was due back at work.

[128] Talley's actions in unilaterally adjourning Mr Browne's disciplinary meeting at such a late stage when it knew or ought to have known he would have already incurred the cost of travelling to Nelson, when it had deprived him of income for five weeks, without seeking any input from him were not the actions of a fair and reasonable employer.

Request for financial assistance

[129] There is a conflict in the evidence regarding the request for financial assistance, which I have resolved in Mr Browne's favour.

[130] Mr Browne and Mr Froude said that when they could not get hold of Ms Sharma on the morning of 18 June 2010 they went to Talley's to see if they could get financial assistance either for Mr Browne to stay in Nelson or for him and Mr Froude to return to Nelson if they went back to Auckland that afternoon. They met with Mr Hazlett just before 10am.

[131] Mr Hazlett said that Mr Browne and Mr Froude did not request financial assistance, because if they had it would have been given. Mr Hazlett's evidence was Mr Browne turned up because he wanted to have the disciplinary meeting, not because he was looking for financial assistance. I do not accept that.

[132] Mr Hazlett's view is not supported by the evidence. Mr Hazlett accepted Mr Browne told him they had flights back to Auckland at 3pm that day, he had not been able to contact his representative, and he could not fly back down to Nelson from Auckland again because of the cost. That was sufficient to put Mr Hazlett on notice that Talley's' late adjournment had created financial difficulties for Mr Browne, so a fair and reasonable employer would have taken steps to address that problem.

[133] It is insufficient for Mr Hazlett to say that because he was not asked outright for a sum of money there was no request for financial assistance. Mr Browne made it clear he had financial problems, which was understandable given his lengthy unpaid suspension. Talley's had enough information from him to be able to put that right, but did not do so. There was also a significant power imbalance, with Mr Browne anxious not to be seen as difficult because he was desperate to keep his job, which explains why he was not as

direct or forceful in requesting financial support as Mr Hazlett seemed to expect him to be.

[134] I accept Mr Browne's and Mr Froude's evidence they explained Mr Browne's financial difficulties and Mr Hazlett was not receptive to providing financial support, so it was only at that point Mr Froude asked if the matter could be resolved that day so they could get their 3pm flights back to Auckland that afternoon.

[135] I also accept that Mr Browne and Mr Froude believed they had no option but to proceed with the disciplinary meeting because Mr Browne could not afford to stay in Nelson, they could not afford to fly back down again from Auckland, and Talley's had not offered any financial support.

Waiver of representation

[136] For the reasons outlined Mr Browne believed he had no option but to have his disciplinary meeting even though he could not get hold of his representative. By unilaterally adjourning Mr Browne's disciplinary meeting at such a late stage and then failing to offer financial assistance or make suitable alternative arrangements, Talley's created a situation where Mr Browne was effectively deprived of his right to representation.

[137] When Mr Hazlett first asked Mr Browne if he was waiving his right to representation, Mr Browne's response was to try to contact Ms Sharma again. Whilst at Talley's, he made two unsuccessful attempts to do so. It should have been clear to Talley's that Mr Browne was not freely waiving his right to representation, but was only doing so because of the situation Talley's had created.

[138] Mr Hazlett was also sufficiently concerned about the representation issue to attempt to contact Ms Sharma himself. Like Mr Browne, he too was unsuccessful. At this point Mr Hazlett again asked Mr Browne if he was waiving his right to representation, and Mr Browne's evidence was that he said he did not have a choice because he had to be on a 3pm flight that afternoon.

[139] The disciplinary notes record that when Mr Browne was asked at the beginning of the disciplinary meeting if he was represented by Ms Sharma he replied *No, we can't get hold of her, I want to proceed without her as I can't come back down*, which was

consistent with what he had been telling Mr Hazlett immediately prior to the disciplinary meeting.

[140] I accept Mr Browne's and Mr Froude's evidence that they only agreed to proceed without Ms Sharma because they believed they had no other option. That was consistent with their attempts whilst at Talley's to contact Ms Sharma before the disciplinary meeting and with Mr Browne's reluctance to waive his right to representation right up until it became clear that the disciplinary meeting had to start without him having had an opportunity to speak with Ms Sharma.

[141] Talley's actions deprived Mr Browne of representation at a critical stage in the process, and I consider he was adversely affected by the absence of his representative.

Refusal to drug test

[142] Mr Browne asked to be drug tested twice; first when he was advised of his suspension and again during his disciplinary meeting. Mr Hazlett said he declined to drug test Mr Browne because he believed the results of drug testing could be masked; P left an individual's system so quickly there was no point drug testing for it; and Mr Browne's hair was too short to test.

[143] I find Mr Hazlett rejected Mr Browne's request to be drug tested without properly considering it. He made assumptions which were not backed up by information and which were not supported by any inquiries by him about the reliability of testing and how long drugs could be detected for.

[144] I consider Mr Hazlett did not have good reasons for declining Mr Browne's requests. Talley's was a company which regularly undertook drug testing of employees. LM was drug tested via a urine sample on 18 June 2010 and JM was drug tested for P via a hair sample on 28 June 2010. Prior to May 2010 Mr Burton had been randomly tested twice previously (which incidentally he had passed). In light of this, Talley's reasons for not drug testing Mr Browne do not ring true.

[145] Mr Hazlett's belief Mr Browne's hair was too short to be tested was not well founded because he made no attempt to establish how long hair had to be in order to be drug tested. JM's hair was cut into one and a half centimetre segments which related to approximately six weeks' growth. Mr Browne's hair was at least 3 centimetres long, so a

hair follicle drug test would have detected any drug use by him over the preceding three months.

Defective investigation

[146] Talley's belief that serious misconduct had occurred was not reasonable or justified because it had not fully or properly investigated its concerns about Mr Browne's conduct.

[147] Talley's had considerable resources at its disposal. Despite it having engaged a private investigator, basic inquiries were not made. Ms Plum was the only person who spoke to LM and MS. Obvious lines of inquiry arising from these interviews were never pursued, and obvious questions were never asked. Talley's did nothing to determine what the alleged disclosures from these two witnesses were based on, so it could not have had a reasonable basis for believing the truth of LM's and MS's purported disclosures.

[148] Talley's did not have enough information to fairly determine whether LM had disclosed he had personally seen Mr Browne using P, or had observed Mr Browne exhibiting what he believed were the effects of P use, or whether he was merely relating gossip or rumours he had heard. Mr Hazlett accepted there was a difference in the quality of the disclosure in each of these scenarios but he did nothing to find out which scenario applied.

[149] LM's purported disclosure was vague and non specific. LM did not specify the date(s) or occasion(s) when he alleged Mr Browne had engaged in P use, nor did he say how many times he alleged Mr Browne had used P and there was no information about how LM had knowledge of the matters he had disclosed.

[150] An obvious question which Talley's should have asked, but did not, how did LM knew anything about Mr Browne's behaviour during his shift when they did not work near each other on the vessel and were very unlikely to have had any contact during Mr Browne's shift. Talley's made no attempt to speak to crew who did work in proximity to Mr Browne and who would have been well placed to comment on his behaviour during shift.

[151] The Foreman, Gregory Thomas who Mr Browne worked under, and who saw him regularly over the course of his shift, should have been spoken to see if he had noticed anything untoward about Mr Browne's behaviour. Mr Foreman provided an affidavit

which said from his observations Mr Browne had always appeared normal and had never appeared to be on drugs.

[152] There was no evidence Mr Hazlett gave any consideration to the weight which should be given to the LM and MS allegations, he just accepted the truth of their alleged disclosures without making any inquiries to establish the likely veracity of that information and without taking any steps to corroborate the alleged disclosures.

[153] A fair and reasonable employer would have carefully assessed the credibility of LM's disclosure. There was no evidence Mr Hazlett did so. He accepted the truth of LM's allegations of P use by Mr Browne and Mr Burtton but he disbelieved LM's allegations of P use by DT and JM. Mr Hazlett did not satisfy me he had good reasons for finding LM credible in some respects but not others.

[154] Mr Hazlett did not appear to have formed any view about the truthfulness or otherwise of LM's allegations of cannabis use by crew and Talley's did nothing to investigate LM's cannabis use disclosures. Whether the cannabis use disclosures were credible was a relevant factor which should have been, but was not considered when assessing LM's P use disclosures.

[155] Talley's failure to clarify LM's P use disclosures or to obtain any specific details of these from him meant it was not in a position to properly assess his credibility. Nor did Mr Hazlett consider what impact the fact LM's disclosure had been made whilst he was being interviewed about his own drug use. Ms Plum's notes of 6 May 2010 record LM *said he's very afraid of losing his job, and would be willing to do whatever it took to keep it*. That comment should have been, but was not, taken into account by Mr Hazlett when he was assessing LM's credibility.

[156] There was no written record of MS's alleged disclosure which should have alerted Mr Hazlett to the need for further inquiries to be made with MS to clarify what information she had. There was no evidence Mr Hazlett did anything to assess the credibility of MS's alleged disclosure.

[157] Mr Hazlett was not sure when Ms Plum told him about MS's alleged disclosure, and he did not exactly recall what Ms Plum told him. His impression was that MS has seen Mr Browne use drugs on board. It was not fair or reasonable for Mr Hazlett to have relied on hazy impressions to establish an allegation which amounted to serious criminal offending.

[158] As the decision maker, Mr Hazlett had an obligation to ensure he was clear about what information he was relying on to support his finding that serious misconduct had occurred so he could satisfy himself that his conclusion was based on a reasonable belief.

[159] A fair and reasonable employer would have made inquiries to establish exactly what MS knew and how she knew it. If that resulted in MS making specific allegations against Mr Browne, then a fair and reasonable employer would have obtained specific details in support of her disclosure such as when drug use had occurred, where it had occurred, and the circumstances of it, and how MS knew about it. That did not occur.

Failure to keep accurate records

[160] A fair and reasonable employer would ensure there was an accurate record of its investigation and of the information it had obtained. This would involve taking notes of the interviews it conducted and the meetings it had so that the employee knew who the employer had spoken to, the questions witnesses were asked, and what each witness said.

[161] In a matter involving serious misconduct which amounts to serious criminal offending, consideration should be given to providing key witnesses with an opportunity to check and if necessary amend their statements if the employer intends to rely on them. LM never saw Ms Plum's notes, so had no opportunity to confirm she had recorded his disclosures correctly.

[162] Ms Plum did not take any notes of the disclosures she said JS, AM, KD, and BP. Ms Plum did not make notes of Mr White's interview with MS in her cabin on 12 May 2010. Nor did Ms Plum take notes or make any record of her interview with MS in her office on 12 May 2010.

[163] Mr Hazlett did not make a record of his interviews with BP, JS, Lee Dodunski, Eru Puata or of his telephone call(s) with Ms Bellamy. Mr Hazlett thought he may have spoken to some other crew, but he was not sure who or when or what was said. Mr Hazlett spoke to Mr White about the search some time after 12 May 2010, but there was no record made of that.

[164] Mr White did not make a record of any of his discussions with the crew who had Max indicate on their bags and his report did not include that information. Mr White had no record of MS's alleged disclosure about Mr Browne.

[165] Mr Milne did not take notes of his interviews with crew on 12 May 2010 so he did not have any notes of his interview with Mr Browne. Mr Milne's report dated 24 May 2010 was based on his recall of the interviews he had conducted on 12 May 2010 and on the very brief notes Mr Smith had made.

[166] Mr Smith's notes of Mr Browne's 20 minute interview by Mr Milne consisted of 11 lines, some with only one or two words per line.

[167] No record or notes were made of Ms Bellamy's alleged "threatening phone call" disclosure.

[168] Because Talley's did not keep accurate records, Mr Browne had no way of knowing who Talley's had spoken to or what those people had said.

Predetermination

[169] When I asked Mr Hazlett why he did not ask LM any specific questions about his disclosure about Mr Browne, Mr Hazlett told me that once the dog had indicated on the bags of crew, he took the statements Ms Plum's notes attributed to LM as accurate.

[170] Despite what Mr Hazlett said, he in fact only took LM's disclosures against Mr Browne and Mr Burton as accurate. He rejected the disclosures LM had made about P use by DT and JH and he never considered LM's disclosures about cannabis use by DH, TS, MJ, NW or GL. Nor did Mr Hazlett consider LM's disclosure that DT and CM were regular cannabis users.

[171] When asked what he knew about MS's disclosure, Mr Hazlett said Ms Plum had told him MS had named Mr Browne as a P user. When asked why MS had named Mr Browne, Mr Hazlett said he did not know. He said he presumed it was because Ms Believed Mr Browne was a P user. Mr Hazlett said he took that as direct evidence that MS knew Mr Browne had used P on the vessel. When asked what he had based that view on, Mr Hazlett said *I can't recall what it was directly based on. I just took it as a fact.*

[172] Mr Hazlett said no inquiries were made into MS's alleged disclosure because he assumed she had disclosed direct knowledge of P use by Mr Browne. I find that was not a reasonable assumption for him to have made based on the evidence available at the time.

[173] Despite interviewing JS who had allegedly disclosed drug use on *The Enterprise* to Ms Plum, Mr Hazlett did not ask JS what he knew about drug use on the vessel or how he knew it. Despite speaking to Ms Bellamy, who Talley's alleged had reported a threatening phone call from Mr Burtton to Mr Browne and JM, Mr Hazlett did not ask her anything about it.

[174] Mr Hazlett appeared to have been prejudiced by the information passed on by Ms Plum because he effectively closed his eyes to obvious lines of inquiry arising out of that information. It should have been obvious to him the investigations that had been conducted were seriously deficient and that further inquiries needed to be made before the disciplinary concerns were progressed.

[175] The evidence I heard satisfied me Mr Hazlett did not approach this matter with an open mind. He acted from the outset as if the allegations of drug use had been proved against Mr Browne, when the information available to him did not reasonably support that view.

Conclusion

[176] The drug related allegations put to Mr Browne amounted to serious criminal offending, so the evidence required to support them needed to be as convincing as the charge was grave.²¹ There was no evidence Mr Hazlett did anything to critically assess the information he had. If he had he would have identified it was unreliable and unsubstantiated hearsay evidence.

[177] This is not a case where a single or even several procedural deficiencies or errors impacted on Talley's decision to dismiss Mr Browne. Talley's errors began at the outset of its investigations into drug use on *The Enterprise* and continued at each stage of its investigation. At no point were Talley's actions and how it acted what a fair and reasonable employer would have done in all the circumstances either at the time it suspended Mr Browne or when it subsequently dismissed him.

[178] The way Talley's treated Mr Browne was extremely unfair. It accused him of misconduct amounting to serious criminal offending, but failed to provide specific details of its allegations. It gave him no information about its concerns. Its actions deprived him of his right to representation. It failed to properly investigate its concerns. It failed to ask

²¹*Honda NZ Ltd v NZ Shipwrights etc Union* [1990] 3 NZILR 23

obvious questions of its witnesses and made no attempt to follow up obvious lines of inquiry, despite having engaged the services of a private investigator. It approached the matter with a closed mind. It breached its contractual obligations. It breached its good faith obligations. It failed to comply with the principles of natural justice.

[179] Talley's many procedural errors were not mere technical deficiencies. These errors were significant, pervasive, and fundamentally undermined the reasonableness of Talley's belief serious misconduct had occurred. These errors were manifestly unfair because they deprived Mr Browne of an opportunity to properly respond to the Talley's concerns.

[180] An employer that fails to conduct a full and fair inquiry into allegations of serious misconduct runs the risk of the Authority concluding that its belief that serious misconduct had occurred was not based on reasonable grounds. That is the case here. It cannot be said that if Talley's had adopted a fair and reasonable process, it would still have come to the conclusion that Mr Browne had engaged in serious misconduct.

[181] I find that Mr Browne has valid personal grievance claims. He was unjustifiably disadvantaged as a result of his indefinite unpaid suspension and his dismissal was substantively and procedurally unjustified.

Remedies

[182] Although Mr Browne sought permanent reinstatement in his Statement of Problem, this remedy was withdrawn prior to the Authority's investigation.

Mitigation of loss

[183] Mr Browne had an obligation to take steps to mitigate his loss. His applications to Sealords were declined. Mr Browne's father assisted him with his search for work through his contacts.

[184] Mr Browne applied to WINZ, and was given help through WINZ to put together a CV. WINZ required him to actively seek work and he met with his caseworker weekly to search through the WINZ job list database.

[185] Mr Browne, who had previous experience as a bricklayer, looked for work in that industry. He applied for three jobs through WINZ, two for bricklaying and one as a storeperson. He had an interview for one bricklaying job, which was offering six week's

work. However, when Mr Browne advised he needed to attend an Authority investigation in Nelson in December, the owner of the business said there was no point employing him.

[186] Mr Browne looked in his local paper on a weekly basis, but did not see any jobs he could apply for.

[187] On 7 September 2010 Mr Browne obtained casual employment with The Fishing Company Limited and at the time of the investigation meeting he had completed ten short trips at sea. He said that he accepted all of the work that was offered to him but he had earned less than he would have earned working for Talley's. He was unable to work immediately prior to the Authority's investigation meeting commencing on 8 December 2010 because he had to remain on land so he was available to his representative and could prepare his claims for the investigation meeting.

[188] I find that Mr Browne took appropriate steps to mitigate his loss.

Lost remuneration

[189] Mr Browne claimed reimbursement of lost remuneration, including lost catch bonuses, from 12 May 2010 up until 8 December 2010.

[190] An award of lost remuneration under section 128(2) of the Act is discretionary and subject to proof of loss and mitigation. Mr Browne established loss of more than three months' remuneration. He mitigated his loss and this is an appropriate case to exercise the Authority's discretion under section 128(3) of the Act to award more than three months' lost remuneration.

[191] Mr Browne received no remuneration during his unpaid suspension from 12 May to 18 June 2010 and he lost remuneration from the date of his dismissal to 8 December 2010.

[192] Talley's is ordered to pay Mr Browne an amount equivalent to the total remuneration he lost over the period 12 May to 8 December 2010 (including any catch bonuses he would have been paid if he had remained employed) less the amount Mr Browne earned over that period.

[193] The evidence from which to calculate this amount was not available at the time of the investigation meeting, so the parties have 14 days within which to agree, if possible,

on the amount of Mr Browne's lost remuneration. If that is not possible, leave is reserved to apply to the Authority to fix this amount.

Interest

[194] Mr Browne claimed interest on his lost remuneration.

[195] The Authority has jurisdiction under clause 11 of Schedule 2 of the Employment Relations Act 2000 ("the Act") to award interest at the rate set by the Judicature (Prescribed Rate of Interest) Order 2008, which is the means of setting the rate authorised by the Judicature Act 1908.²²

[196] Mr Browne has been without his wages from Talley's since he was suspended on 12 May 2010 and I consider this is an appropriate case in which to award interest.

[197] I order Talley's to pay Mr Brown interest on his lost remuneration (which is to include his unpaid catch bonuses) at the rate of 8.4%²³ per annum from 18 June 2010, which was the date of his dismissal. I have used this later date instead of 12 May 2010 in recognition of the high rate of interest awarded, which the Authority has no power to adjust.²⁴

Loss of benefits

[198] Mr Browne in his Statement of Problem claimed *compensation for loss of any benefits* but he did not identify what those benefits were and he did not quantify them. In a memorandum dated 29 October 2010 Ms Sharma amended the remedies claimed by Mr Browne and claimed (among other things) *for payment of notice, plus interest in accordance with clause 11.1 of the contract (sic) of employment*. The amount claimed was not quantified.

[199] Ms Sharma subsequently advised that the reference in her memorandum to clause 11.1 was incorrect and should have been to clause 11.4.

²² s.87(3) Judicature Act 1908

²³ As set by the Judicature (Prescribed Rate of Interest) Order 2008

²⁴ The Authority is bound by the Judicature (Prescribed Rate of Interest) Order 2008 and cannot adjust the rate of interest awarded, so the current rate of 8.4% per annum must be applied.

[200] Mr Browne in his evidence claimed an unpaid catch bonus under clauses 11.2 and 11.4 of his employment agreement, but said he did not have the information to quantify his claims. I have dealt with these claims as lost benefits.

[201] Ms Sharma's submissions did not deal with the Mr Browne's lost benefit claims.

[202] Talley's evidence was that clause 11.4 only applied if an employee had just completed two trips on at the time of termination. Information provided to the Authority on 2 May 2011 suggested Mr Browne might be entitled to a half catch bonus under clause 11.5 of his employment agreement.

[203] Clauses 11.2 and 11.4 of Mr Browne's employment agreement apply in the alternative. Clause 11.2 covered employees with one year of less service, so it does not apply to Mr Browne.

[204] Clause 11.4 applied to employees with more than one year's service. It provided a mechanism for calculating the catch bonus to be paid upon termination, provided the employee gave the correct contractual notice and the employment ended for reasons other than serious misconduct.

[205] Talley's dismissal of Mr Browne on the grounds of serious misconduct was unjustified, so I find it does not prevent the operation of clauses 11.4 or 11.5. If Mr Browne had not been unjustifiably dismissed, subject to him meeting the qualifying criteria, he would have continued to have had the benefit of being paid the full or half catch bonus upon termination, as calculated in accordance with clauses 11.4 or 11.5 of his employment agreement.

[206] Clause 11.4 stated that upon termination, an employee who has immediately completed two trips (or one trip on for those on the trip on/trip off system) is entitled to receive a full catch bonus share for the paid trip off following. Clause 11.5 stated that upon termination an employee (not being on trip on/trip off) who had just completed one trip on is entitled to a half catch bonus share for the paid trip off following.

[207] I find that if Mr Browne's trip rotation meant he met the requirements of clauses 11.4 or 11.5 then he is entitled to receive a full or half catch bonus share (as the case may be) as if he had given, or been given, contractual notice of termination which had terminated his employment on 8 December 2008.

[208] Mr Browne's actual entitlements (if any) under clauses 11.4 or 11.5 could not be determined from the information before the Authority, so the parties are directed to attempt to agree on Mr Browne's entitlements (if any) under clauses 11.4 and 11.5 of his employment agreement. If agreement is not reached within 14 days the parties may apply to the Authority to fix that amount.

[209] Mr Browne has received a high interest rate on his lost remuneration so I do not consider it appropriate to award him interest on any amount he may be entitled to under clauses 11.4 or 11.5 of his employment agreement.

Injury to reputation

[210] Mr Browne sought \$10,000 for injury to his reputation. The availability of reputational damages is an important question of law which has not yet been resolved by the Employment Court.²⁵ However, I do not have to resolve that issue because even if reputational damages could be awarded, this is not an appropriate case for such an award because Mr Browne's evidence did not satisfy me he had in fact suffered reputational damage.

[211] Mr Browne's evidence under this head of claim can more properly be described as evidence which supported his claim for hurt and humiliation, so I have considered it in that content instead.

Hurt and humiliation

[212] Mr Browne sought \$15,000 under section 123(1)(c)(i) of the Act for the humiliation, loss of dignity, and injury to feelings he suffered as a result of the suspension and matters connected to it, and \$20,000 under section 123(1)(c)(i) of the Act for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified dismissal. Ms Sharma in her submissions suggested I make a global award for hurt and humiliation of \$30,000.

[213] The evidence satisfied me Mr Browne suffered significant hurt, humiliation and distress as a result of his unjustified suspension and unjustified dismissal. He described feeling powerless as if he was facing a David and Goliath situation. Mr Browne said he was bewildered and frustrated. He explained how he had been unable to face his ten year

²⁵ *George v Auckland Regional Council* [2010] NZEMPC 138

old daughter because of the shame he felt as a result of his unjustified suspension and dismissal and how he was unable to financially provide for her when he lost his income.

[214] Mr Browne believed his reputation had been irreparably damaged and he would now always be seen as being associated with illegal drugs. He was concerned future employers were likely to view him with suspicion as being an illicit drug user because of the publicity this matter attracted.

[215] Mr Browne's grandparents had to be told about the situation as a result of media publicity from his unsuccessful interim reinstatement application. Mr Browne said he was so ashamed, embarrassed and humiliated he could not bring himself to speak to his beloved grandfather about it. Mr Browne's grandfather passed away in September 2010 and Mr Browne was particularly distressed that happened before he could clear his name.

[216] Mr Browne explained how he had become financially dependent on his mother and stepfather, which he found humiliating. Mr Browne said his fight to clear his name had put him and his family under huge financial stress.

[217] Mr Browne's stepfather, Kim Froude, gave evidence which confirmed the adverse effects of the suspension and dismissal on Mr Browne. He said that Mr Browne had loved his job and was devastated by losing it. Mr Froude advised the family was solely dependent on his income, so supporting Mr Browne during this process had been financially very challenging for all of them.

[218] Mr Browne's evidence did not separately distinguish between the hurt and humiliation he suffered over his unjustified suspension and that connected to his unjustified dismissal. Both personal grievances were close in time and the facts so interwoven it would be artificial to make separate awards under section 123(1)(c)(i) of the Act for each grievance.

[219] It is clear from the authorities an award under section 123(1)(c)(i) of the Act must address the actual consequences of the unjustified grievance on the employee and it must be real and adequate. Reasonable consistency of quantum is expected and the Courts have previously stressed the need for moderation.²⁶

[220] An award is not to be increased to punish an employer for the way it has treated an employee, rather it must reflect the actual humiliation, loss of dignity, and injury to

²⁶ *Smith v Life to The Max Horowhenua* [2010] NZEMPC 152

feelings Mr Browne suffered. Care must be taken not to base an award of compensation on a perceived need to penalise an employer for what might be regarded as outrageous conduct.²⁷

[221] I am mindful the award of compensation must be limited to the combined effects of the suspension and dismissal on Mr Browne.

[222] Mr Browne gave evidence about the financial impact the unpaid suspension had on him and I recognise that was serious. He also suffered significant stress as a result of his unsuccessful attempts to obtain interim reinstatement, first from the Authority and then from the Court.

[223] I accept Mr Browne's feelings were adversely affected by Talley's refusal to let him undergo a drug test, when other crew were allowed to. Talley's failure to disclose the specific information it had about its concerns, both at the suspension and disciplinary stages of the process also left Mr Browne bewildered and very upset.

[224] Mr Browne was distressed because he was not given an opportunity to persuade Mr Hazlett why he should not be suspended or to discuss what impact an unpaid suspension would have on him. Mr Browne had to spend the first week of his suspension with JM who he hardly knew, because he did not have anywhere in Nelson to stay and without income he could not afford to rent accommodation. JM's girlfriend was gravely ill with very serious medical issues. JM was the income earner for his household so his unpaid suspension and Mr Browne's presence created a very stressful environment for all of them.

[225] This stress was compounded when Talley's brushed off Mr Browne's attempts whilst he was on suspension to find out what was happening with his case.

[226] Mr Browne was left completely in the dark about Talley's concerns until he received the disciplinary letter a month after he was suspended. The unduly protracted suspension, the last minute unilateral change of the disciplinary meeting, the failure to offer financial support and the pressure that put him under to participate in the disciplinary meeting without his representative are all issues which understandably created real stress for him. All of these factors support a higher than average award of compensation.

²⁷ *Jesudhass v Just Hotel Limited* [2006] ERNZ 173

[227] Mr Browne was undoubtedly badly affected by Talley's unjustified actions and unjustified dismissal, but without minimising that, many of the matters he referred to (such as embarrassment, shame, impact on family relationships, anxiety about future employment) are common to many unjustified dismissal cases.

[228] Other factors I have weighed when assessing compensation include; Mr Browne did not need to seek medical attention; he was not a long serving employee, at the time of his suspension he had worked for Talley's for just under one year; he obtained casual work within three months of his dismissal; he had ongoing support from his family; and his employment record recorded a resignation rather than a serious misconduct dismissal.

[229] Insofar as Employment Court awards under s.123(1)(c)(i) are able to offer guidance, I have considered the level of compensation awards in *Mercer v Maori Television Service*²⁸; *Lewis v Howick College Board of Trustees*²⁹; *Smith v Life to the Max Horowhenua Trust*³⁰ and *Jesudhass v Just Hotels Limited*.³¹

[230] The total amount I award Mr Browne for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act for both personal grievances is \$20,000.

Contribution

[231] Having established Mr Browne has valid personal grievance claims for unjustified disadvantage and unjustified dismissal, the Authority is required to assess whether Mr Browne contributed towards the situation which gave rise to his grievances.

[232] If I had heard credible or reliable evidence that Mr Browne had used drugs on *The Enterprise* I would have had no hesitation in reducing the remedies on the ground of contribution. However, after listening to the numerous witnesses and carefully reviewing the voluminous material, I am satisfied there was no such evidence. I therefore find Mr Browne did not contribute to his grievance, so no deduction is to be made from the remedies awarded.

²⁸ [2010] NZEMPC 133

²⁹ [2010] NZEMPC 4

³⁰ Ibid 23

³¹ Ibid 24

Penalty

[233] Mr Browne sought a \$5,000 penalty against Talley's for its breaches of the good faith obligations in s4(1A)(c) of the Act and he applied to have any penalty awarded paid to him.

[234] Section 4A of the Act allows the Authority to impose a penalty for certain breaches of good faith. A penalty can be imposed on a party who fails to comply with the s4(1) duty of good faith if that failure was deliberate, serious, and sustained, or was intended to undermine bargaining for an employment agreement, an employment agreement, or an employment relationship.

[235] The maximum penalty which applied at the time Talley's breaches of good faith occurred was \$10,000.³²

[236] I find Talley's breaches of good faith by failing to provide Mr Browne with access to information relevant to the continuation of his employment and an opportunity to comment on it³³ were deliberate, serious, and sustained.

[237] Talley's knew Mr Browne's counsel had requested information and it had unilaterally rescheduled the disciplinary meeting because it did not have that information available. I find Talley's must have deliberately decided to proceed with the disciplinary meeting despite knowing that Mr Browne had not been provided with any information about the disciplinary allegations against him.

[238] I find Talley's actions were serious because they deprived Mr Browne of the opportunity to comment on the information Talley's had against him. I also find Talley's breach of good faith was sustained because it continued from the time the disciplinary letter was dated 12 June 2010 was provided until Mr Browne's dismissal on 18 June 2010.

[239] I consider a penalty of \$2,500 is appropriate, but have decided it is not appropriate for that penalty to be paid to Mr Browne and that it should be paid to the Crown.

³² This maximum was increased on 1 April 2011

³³ Section 4(1A)(c)(i)&(ii) of the Act

Outcome

[240] Mr Browne is awarded lost remuneration from 12 May to 08 December 2010 under s128(3) of the Act, in an amount to be quantified by the parties. If agreement on that amount is not reached, the parties may apply to the Authority to fix it.

[241] Mr Browne is awarded lost benefits under s123(1)(c)(ii) of the Act, provided his trip roster means he qualifies for a full catch bonus share under clause 11.4 or for a half catch bonus share under clause 11.5 of his employment agreement. This amount (if any) is to be calculated as if Mr Browne's employment ended on 8 December 2010 and the parties are directed to attempt to agree on quantum. If agreement is not reached, the parties may apply to the Authority.

[242] Talley's is ordered to pay \$20,000 to Mr Browne under s123(1)(c)(i) of the Act.

[243] A penalty of \$2,500 is imposed on Talley's for its breach of s4(1A)(c) of the Act.

Costs

[244] Costs are reserved.

[245] Mr Browne was wholly successful and is entitled to a contribution towards his legal costs. The parties are encouraged to agree costs between them. If costs are not resolved by agreement, they may be addressed by an exchange of memoranda. The applicant's memorandum is to be filed within 21 days of the date of this determination and the respondent's memorandum is to be filed 14 days after that, with the applicant having 7 days within which to file submissions in reply.

[246] I am told there was no without prejudice except as to costs offers in this case. If that is correct then, subject to the parties' submissions, the Authority is likely to adopt its usual daily tariff based approach towards costs.

Rachel Larmer

Member of the Employment Relations Authority

