Determination Number: CA 84/05
File Number: CEA 414/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Wade Fallen (Applicant)
AND	Sealord Group Limited (Respondent)
REPRESENTATIVES	Mary Moorhead, Counsel for Applicant Craig Stevenson, Counsel for Respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	17 May 2005
DATE OF DETERMINATION	8 June 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Wade Fallen worked for the Sealord Group Limited from about February 2001 until his summary dismissal on 5 January 2005. There are two aspects to his problem. First, he says that a failure by Sealords to provide him with a safe workplace constitutes an unjustified action that affected his employment to his disadvantage. Secondly, he says that the dismissal is unjustifiable.

[2] At the relevant time, Mr Fallen was working as a freezer-man aboard a deep-sea fishing trawler, the Paerangi. The trip started in early October 2003. On 7 November at about 1530 hours, Mr Fallen suffered an accident which caused him bruised and cracked ribs. At the time, the weather was a strong northwest gale with heavy swell conditions.

[3] Before the trip started, Mr Fallen had requested freezer boots but this request was vetoed by the vessel's skipper, Michael Jackman. Mr Fallen then worked in ordinary gumboots. Mr Fallen says that he slipped over because he was not supplied with footwear appropriate for his working conditions. To resolve this grievance, it is necessary to consider whether the skipper's decision not to issue freezer boots is an action that affected Mr Fallen's employment to his disadvantage by causing him to suffer the accident. If a breach is established, it will be necessary to consider the provisions of the Injury Prevention, Rehabilitation and Compensation Act 2001 since the accident was covered by ACC.

[4] The day after the accident (8 November), Mr Jackman was in Mr Fallen's cabin. The vessel gave a heavy roll due to the sea swell and an empty bottle of Jim Beam slid out from under the sofa. Several meetings ensued and there are some factual disputes about events at those meetings that need to be resolved. One ground of serious misconduct in Mr Fallen's employment agreement is being in possession of alcohol on company vessels or consuming alcohol on company vessels without management consent. Eventually, Sealords decided on 5 January 2004 to dismiss Mr Fallen for serious misconduct based on a breach of that ground.

[5] These grievances were first raised by Mr Fallen with Sealords in a letter from his solicitor dated 12 February 2004, shortly after the expiration of 90 days from the accident. At the investigation meeting, Sealords consented to Mr Fallen raising the grievance about the accident and unsafe working conditions out of time. The dismissal grievance was raised within the 90 day period.

The accident

[6] Greg Little is employed by Sealords as the cook on the Paerangi. He is also the medic on the vessel so he was involved in the treatment of Mr Fallen's injuries. Mr Little says that Mr Fallen admitted to him while being treated for the injuries that he had got a fellow crew member to hit him in the ribs with an iron bar, hoping to force an emergency evacuation off the vessel to enable him to deal with relationship difficulties with his girlfriend. Mr Fallen denies making that admission and says that his injuries were caused by slipping over. Mr Little explained to me that in his years at sea he had often seen similar events. He thought Mr Fallen had consumed the Jim Beam to help tolerate the force of the deliberate blow. However, Mr Little did not smell alcohol on Mr Fallen when he treated the injuries or at any other time. There is also evidence that other crew members did not notice Mr Fallen display any signs of alcohol consumption. Mr Little gave evidence that he did not report this admission to the skipper although he acknowledged having reported some other aspects of Mr Fallen's behaviour to him. For his part, Mr Jackman said that he did not hear about the iron bar rumour until some time after 5 January 2004. Mr Jackman also told me that the purported accomplice denied the story when later asked about it.

[7] I accept Mr Jackman's evidence that he knew nothing of the iron bar story until after the dismissal. I was not convinced by Mr Little's explanation for his different treatment of the admission as opposed to the other aspects of Mr Fallen's behaviour. I think it likely that if the admission had been made, Mr Little would have told Mr Jackman about it as with the other matters. It follows that I do not accept that an admission was made and that I accept Mr Fallen's evidence that his injuries were caused by him slipping over.

[8] There is a conflict in evidence about the effectiveness of freezer boots. Mr Jackman's evidence is that the freezer boots are insulated for better warmth but provide no better traction than ordinary gumboots. He told me that the stevedores who unload the vessel wear gumboots rather than freezer boots. He also told me that Sealords does not issue freezer boots to employees such as Mr Fallen because experience supports the view that ordinary gumboots provide sufficient traction. On the other hand, Mr Fallen says that the freezer boots provide better traction and are part of the safety gear provided by his current employer for that reason.

[9] The real point is whether the skipper's decision not to issue the freezer boots caused or contributed to the accident which involved Mr Fallen losing his footing on some ice. If so, it would be an action affecting Mr Fallen's employment to his disadvantage. I cannot say with any degree of likelihood that the lack of freezer boots caused or contributed to that accident, even accepting that there might be some difference in grip from the different type of sole or tread. I note that Mr Fallen worked wearing gumboots in the freezer for about 4 weeks before the accident apparently without incident. Most probably, he would have slipped in the circumstances of the ice and sea state on 7 November regardless of the type of boot being worn.

[10] There are other problems with the claim. Section 317 of the Injury Prevention, Rehabilitation and Compensation Act 2001 provides:

> *(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—*
> *(a) personal injury covered by this Act; or*
> *(b) …*
>
> *(2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from,—*
> *(a) …*
> *(b) …*
> *(c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.*
>
> *(3) However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (2) for personal injury of the kinds described in subsection (1).*

[11] The evidence of distress suffered by Mr Fallen following the accident was limited. On that evidence I find that any distress suffered by Mr Fallen arose from the physical injury suffered by Mr Fallen on 7 November 2004 rather than the non-supply of freezer boots. Section 317 of the Injury Prevention, Rehabilitation and Compensation Act 2001 therefore prevents any award covering those same effects.

[12] The accident was not the only thing troubling Mr Fallen. His relationship problems also caused him much distress prior to and after the accident. To the extent that any distress was caused by those problems rather than any personal grievance, no compensation could be awarded against Sealords. Together, his relationship problems and the physical injury wholly explain Mr Fallen's emotional state shortly before and following the accident.

Mr Fallen's treatment

[13] Mr Fallen is critical of Sealords for not evacuating him off the vessel immediately after the accident, either by helicopter, delivering him to port or off-loading him onto a shore bound vessel.

[14] When first treated soon after the accident, Mr Fallen was given to think by Mr Little that he might be evacuated. That was discussed between Mr Little and Mr Jackman and a decision was made to observe Mr Fallen's condition. Mr Jackman communicated that to Mr Fallen at about 2200 hours on 7 November.

[15] Mr Fallen became angry about not being off-loaded earlier and Mr Little's refusal to supply further pain relief. The circumstances of that refusal are in dispute, but it is unnecessary to resolve the disagreement.

[16] In evidence, Mr Fallen accepted that there would have been danger involved in evacuating him due to the heavy seas and his injuries. The concession was properly made and it supports Mr Jackman's assessment at the time. I accept Mr Jackman's evidence that Paerangi was about 12 hours at full steam from Bluff at the time of the accident. A decision had to be made whether to break off fishing to deliver Mr Fallen to port based on the seriousness of his injuries and the capacity to treat him on board. I accept that the treatment involved rest and pain relief and that Mr Fallen was able to be treated on board. Put another way, there was no reason to think Mr Fallen's condition would worsen or could not be safely managed on board the vessel. I see no reason to criticise the decision not to evacuate Mr Fallen. He was eventually offloaded at Bluff on 17

November. There was no evidence to suggest that the delay in returning him to shore affected his recuperation.

The Jim Beam bottle

[17] Mr Jackman was in Mr Fallen's cabin on 8 November at 700 hours because he had received a report from Mr Little that Mr Fallen was angry and aggressive, had threatened to smash up the wheelhouse and had caused someone on shore to contact Sealords management anonymously complaining about the failure to evacuate an injured crew member off a fishing vessel. During the exchange, Mr Fallen was affected by his injuries and disgruntled about not being evacuated while Mr Jackman remonstrated with him about Mr Little's report. As luck would have it, the empty bottle emerged and Mr Jackman picked it up. Mr Fallen says that Mr Jackman was angry and threatened him with the bottle. I accept Mr Jackman was angry and that he probably waved the bottle about remonstrating with Mr Fallen but I do not accept that Mr Fallen was threatened with the bottle. Mr Jackman confirmed his written evidence that Mr Fallen repeated the threat to smash up the wheelhouse. When questioned about that evidence, Mr Jackman said that he never heard the threat from Mr Fallen directly. I find that the latter statement is probably correct. Mr Fallen's evidence is that he had said jokingly to Mr Little *what does someone have to do to get off the boat, smash up the wheelhouse or something?* I do not accept that it was said jokingly but nor do I accept that it was intended by Mr Fallen as a serious threat. At the time he was annoyed that he had not been evacuated and he was expressing that frustration.

[18] Mr Fallen denied drinking the Jim Beam. Mr Jackman left the cabin and went to tell Mr Little and the mate about the bottle. A while later, Mr Jackman spoke again to Mr Fallen and told him that there would be a disciplinary inquiry which might result in dismissal.

[19] On 9 November, Mr Fallen spoke to Mr Jackman in the wheelhouse. Mr Fallen apologised for his behaviour the previous day. It is not suggested that there was any admission about the Jim Beam bottle.

[20] There was a meeting about the serious misconduct allegation on or about 9 November. I accept that Mr Fallen knew that he might be dismissed before he was asked for any explanation. It was put to Mr Fallen that the circumstances indicated that he had been drinking in his cabin. The circumstances mentioned were: not sharing the cabin; having been at sea for four weeks before the bottle emerged; cabin inspections during that 4 weeks not disclosing the bottle; standard cleaning and checking of cabins before the vessel entered dry dock in Auckland immediately prior to departure from Nelson; Mr Fallen's previous history of drinking in a cabin. There was also discussion about the alleged threat to smash up the wheelhouse and the anonymous phone call. Mr Fallen denied making any threat, denied drinking the Jim Beam and told Mr Jackman about two empty premix bourbon and coke bottles he had found in the cabin. The skipper's subsequent inquiries confirmed that the pre-mix bottles had been shared by the former occupier of the cabin and other crew member while the vessel was in Auckland but that person denied any knowledge of the empty Jim Beam bottle. Mr Fallen also said that he believed the skipper was biased against him because of earlier incidents between them. Mr Jackman decided to defer making a decision about the disciplinary matter until he could involve other Sealords management given the question raised about his partiality.

[21] As mentioned above, Mr Fallen was off-loaded at Bluff on 17 November.

On shore investigation

[22] There was some difficulty arranging a meeting but Mr Fallen eventually received a letter from Sealords about a meeting regarding the incident on the Paerangi when an alcohol bottle was found in his cabin. Later, it was agreed that there would be a phone conference between Mr Fallen, Mr Jackman and Sealords Human Resources Manager (Patrick Smith) instead of a meeting. That took place on 5 January 2004. I accept that Mr Fallen knew that his employment was in jeopardy depending on the outcome of that discussion.

[23] During the phone call, Mr Smith raised the facts that indicated that Mr Fallen had been consuming the Jim Beam while at sea. Mr Fallen repeated his denial of any knowledge of the bottle until it emerged from under the sofa on 8 November. There was reference to Mr Fallen's previous warnings and some discussion about the threat and the anonymous phone call. The call then ended to allow Mr Smith and Mr Jackman to decide what to do.

[24] While Mr Jackman was involved, the evidence makes it clear that Mr Smith was the primary decision maker at this point. He told me and I accept that that it was difficult to get any common ground about the alleged threat and the anonymous phone call so the focus was on the alcohol. He also made it clear that there was insufficient evidence to establish that the consumption of alcohol had contributed to the accident suffered by Mr Fallen, contrary to Mr Jackman's belief. At that point, neither Mr Smith nor Mr Jackman were aware of the rumour about the iron bar. Having considered what was said by Mr Fallen, Sealords formed the view that he had consumed the bottle of Jim Bean during the trip, that this behaviour constituted serious misconduct by Mr Fallen and that he should be dismissed. Sealords rang Mr Fallen and told him this.

Justification for dismissal

[25] To justify a dismissal for serious misconduct, Sealords must establish that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct: see *W & H Newspapaers Ltd v Oram* [2000] 2 ERNZ 448. However, Mr Fallen accepts that consuming alcohol while at sea could amount to serious misconduct justifying dismissal in the context of his employment. He says that Sealords did not conduct a full and fair investigation and that it could not establish to a high degree of probability that the Jim Beam bottle was his. That last part is a reference to cases such as *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* [1990] 3 NZILR 23.

[26] There was sufficient information available to Sealords at the time for it to reasonably conclude that the empty bottle belonged to Mr Fallen. Sealords rejected as unlikely Mr Fallen's contention that the bottle was under the sofa before his trip commenced. That relates to the probability of the bottle moving in response to the movement of the vessel at sea over approximately a four week period. Mr Fallen indicated that a former occupant must have been responsible, but Sealords satisfied itself that there was no connection between the two premix bottles placed in the rubbish tin and the Jim Beam bottle placed by someone under the sofa. If the bottle had probably been put under the sofa by Mr Fallen during the trip, then he brought it on board with alcohol in it and he consumed the alcohol during the trip. Mr Fallen's explanation allowed no other reasonable conclusions. The several crew who were asked had not observed any signs of alcohol on Mr Fallen but his pattern of work and the separate cabin allowed him the opportunity to drink without that being obvious to others. It was known that Mr Fallen drank alcohol and that he was aware of the rule because he had received a final warning in February 2003 for drinking alcohol on board a vessel during a port fuel stop.

[27] Mr Fallen says that the dismissal is tainted because Mr Jackman was biased towards him as a result of earlier incidents. Mr Jackman gave Mr Fallen the two earlier warnings referred to during the investigation meeting. That is likely to be the principal source of Mr Fallen's view that Mr Jackman was biased towards him. In the circumstances disclosed by the file material relating to these incidents, it is unsurprising that Mr Fallen received warnings. It must also be remembered that Mr Fallen worked under another skipper immediately before Mr Jackman took him on as the freezer-man on the Paerangi. If Mr Jackman was so badly disposed towards Mr Fallen, he is unlikely to have taken him on. In any event, the involvement of Mr Smith in the dismissal decision answers any concern about bias. That ensured that Mr Fallen's denial of any knowledge of the Jim Beam bottle was fairly considered by Sealords.

[28] I find that Mr Fallen does not have a sustainable grievance concerning his dismissal.

Summary

[29] Mr Fallen does not have any sustainable grievances against Sealords.

[30] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority