



# New Zealand Employment Relations Authority Decisions

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## Lynch v Talley's Group Limited (Christchurch) [2018] NZERA 1127; [2018] NZERA Christchurch 127 (31 August 2018)

Last Updated: 14 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 127  
3022772

BETWEEN JUSTYN LYNCH Applicant

A N D TALLEY'S GROUP LIMITED

Respondent

Member of Authority: Christine Hickey

Representatives: Luke Acland, Counsel for the Applicant

Graeme Malone, Counsel for the Respondent

Investigation Meeting: 8 May 2018 in Nelson

Submissions Received: At the investigation meeting and 12 and 19 May 2018

Date of Determination: 31 August 2018

DETERMINATION OF THE AUTHORITY

- A. **Talley's Group Limited unjustifiably dismissed Justyn Lynch.**
- B. **Talley's Group Limited must pay Justyn Lynch:**
  - (i) **\$19,466.62 nett reimbursement for lost wages; and**
  - (ii) **\$376.24 interest on the lost wages; and**
  - (iii) **\$14,000 compensation.**
- C. **I have reserved the issue of costs and set a timetable for submissions on costs.**

[1] I have issued this reserved determination outside of the three-month period after receiving the last of the submissions. Under s 174C(4) of the Employment Relations Act (the Act) the Chief of the Authority has decided that special circumstances exist and has allowed me to provide the determination outside of the usual three-month period.

### Employment relationship problem

[2] Justyn Lynch was employed by Talley's Group Limited (Talley's) as a Chief Engineer on board the Columbia fishing vessel (the Columbia).

[3] Mr Lynch claims that Talley's unjustifiably dismissed him. He says the dismissal was unjustified because the performance allegations were unjust, untrue and untested, and there was no adherence to a fair process. In the alternative, Mr Lynch argues that Talley's constructively dismissed him.

[4] He seeks reimbursement for lost wages of \$19,466.62, interest on lost wages, and compensation for humiliation, loss of dignity and injury to his feelings of not less than \$20,000.

[5] Talley's denies it dismissed Mr Lynch. It says it had the right to change his role and that on 6 November 2017 a Talley's staff member rang him to reschedule the meeting with Mr Hazlett but Mr Lynch said he had been dismissed. The staff member attempted to correct his misconception but he insisted he had been dismissed. Therefore, Talley's says he abandoned his employment.

### **The issues**

[6] In determining this matter I need to decide:

(a) Did Talley's dismiss Mr Lynch, or did he abandon his employment? (b) If he was dismissed, what kind of dismissal was it?

(c) What remedies is Mr Lynch entitled to?

### **The factual background**

[7] Mr Lynch is a qualified engineer and first worked for Talley's from about mid-2007 until 2012. At that time, he was the second Engineer on the Atlantis and from about 2011 the second Engineer on the Columbia. He then worked elsewhere.

[8] In 2015, Neil Dunlop, the deep-sea division engineering supervisor, called and asked him to work as the Chief Engineer on the Eagle. Mr Lynch took that role. In about May 2016, he heard the Chief Engineer's role on the Columbia was coming up; he asked to be considered for that position. After a trial trip, he was appointed to the role as the Chief Engineer.

[9] The Columbia operated a trip on, trip off system and therefore Mr Lynch was one of two chief engineers.

[10] In June 2017, after a trip on which Mr Lynch was the Chief Engineer and after a formal debrief, Tony Hazlett, the general manager of the deep-sea division, says that he spoke to Mr Lynch and told him he needed to improve his performance significantly, or his position would be at risk. Mr Hazlett also says that Mr Lynch's skipper and Mr Dunlop had previously spoken to Mr Lynch about his poor management and the need for him to take responsibility for oversight of required work.

[11] Mr Lynch recalls a meeting with Mr Hazlett, the two captains and two engineers. However, he denies that Talley's told him that his position could be at risk if his performance did not improve.

[12] Before Mr Lynch and the Columbia sailed to Lyttleton for dry dock repairs, Mr Hazlett spoke to Mr Lynch telling him there would be no room for heavy drinking while working at the dry dock. Mr Lynch agreed with him and told him he would do everything right and take a lead role in the work.

[13] On 1 October 2017, while in Lyttleton Talley's says that Mr Lynch failed to report for work. On 9 October 2017, Talley's issued Mr Lynch with a written warning that he failed to report to work due to a "heavy drinking session the night before." Mr Lynch accepted that warning.

[14] While the Columbia was in dry dock, the sailing date for its next fishing trip had been pushed out a number of times due to the significance of the repairs being undertaken and the additional unexpected time those repairs took. However, Mr Lynch understood that he would be sailing on the next trip which was intended to leave Lyttelton on about 31 October 2017.

### *The letter from Mr Hazlett*

[15] On 24 October 2017, Ben Holden, Talley's vessel manager, handed Mr Lynch a letter dated 18 October 2017. The letter made a number of allegations about Mr Lynch's work performance. Mr Holden handed Mr Lynch an itinerary for a flight back to Nelson for a meeting Mr Hazlett proposed on 27 October. The letter reads:

The state of repair, equipment damage, and inadequate maintenance that was found to exist [on the Columbia] is completely unacceptable.

As Chief Engineer you are expected to be maintaining the vessel's Engineering systems to a high standard and your salary level reflects the importance and responsibilities of the job. Proper attendance to preventative maintenance everyday as well as documentation, direction, oversight and training of trainee engineers and direction and oversight of other staff directed to assist you is simply not being carried out to an acceptable standard, despite Andy Smith and I warning you when we met after the debrief in June that your performance was not acceptable and needed significant improvement or your position would be at risk.

...

Neil's [Engineering Supervisor] attached reports indicate a lack of effort regarding preventative maintenance, inadequate time management and planning. As a Chief Engineer, you are charged with the responsibility for overseeing all engineering work on your vessel, however multiple areas of concern have been identified, for example:

...

Neil, Denis [Mr Lynch's skipper] and myself have lost confidence in your ability to adequately perform in the role of Chief Engineer to the required standard on a vessel as complex as the Columbia. You have been spoken to about your unsatisfactory performance on two prior occasions. However, you have failed to improve your time management, problem solving skills, leadership and general engineering ability.

As you are aware all positions are competitively based and given the vessel's state and lack of improvement in your performance I have reached a preliminary view that [another Talley's Chief Engineer] is better qualified and skilled in terms of his performance to operate as Chief Engineer on the Columbia and that his appointment will best meet the Company's objectives in terms of the safety and operational performance of the vessel and crew.

My proposal is therefore to appoint [the other Talley's Chief Engineer] to your position on the Columbia and assign you as second Engineer elsewhere within the fleet, until such time when we are confident in your ability to perform the role of Chief Engineer to a satisfactory standard.

I will not make any final decision until you have had the opportunity to comment on my concerns and proposals and I therefore require you to attend a meeting with me at my office on 27th October 2017 at

2pm to discuss this issue.

While dismissal is not a potential outcome of the meeting, you are entitled to bring a support person with you to the meeting.

[16] Although Mr Dunlop's reports are referred to, they were not attached to the letter.

[17] On the morning of 25 October 2017, Mr Holden asked Mr Lynch if he could stay on and help work on the vessel. He told Mr Lynch that the meeting with Mr Hazlett in Nelson would be rescheduled.

#### *Coffee with Mr Dunlop*

[18] On 28 October 2017, Mr Dunlop asked Mr Lynch to have a coffee with him. Mr Lynch asked if the replacement Chief Engineer was sailing the following week and Mr Dunlop confirmed that he was. Mr Lynch wanted to know what alternatives there were if he was no longer going to be the Chief Engineer on the Columbia. Mr Dunlop told him about two other possible roles within Talley's fleet, one as a second engineer and a possible role as Chief Engineer on a less complex vessel.

[19] Mr Dunlop says Mr Lynch told him that he was looking forward to having a meeting with Mr Hazlett so he could put his side of the story to him. Mr Dunlop got the impression that Mr Lynch was keen to leave the Columbia and move to a different vessel. Mr Dunlop also said that Mr Lynch was aware that the meeting could not take place until after the Columbia sailed and Mr Hazlett got back from China, where he was going the following week.

[20] Mr Lynch's evidence is different. He says he did not think the blame could possibly be pointed at any one person when there were four engineers on board, including another Chief Engineer, as well as factory engineers. He does not know why Mr Dunlop got the impression he wanted to leave the Columbia. He says he did say it was a bit of a circus, but he enjoyed his job and did not want to leave the Columbia.

[21] He agrees he asked Mr Dunlop what the plan was for him but he says he "felt painted into a corner" and felt like he was being left with no option but to take one of the options Talley's might offer him.

#### *Mr Lynch is flown back to Nelson*

[22] Mr Lynch remained working on the Columbia in Lyttelton until Monday

afternoon, 30 October 2017, when Neil Dunlop, Talley's engineering supervisor for

its deep-sea division, gave him a new flight itinerary to fly back to Nelson later that day. Talley's had not rescheduled a new date for the proposed meeting with Mr Hazlett. Mr Lynch says he did not know Mr Hazlett's movements and that no one had told him a meeting would be scheduled for him a week or more after he was sent home.

[23] Mr Dunlop says that after he met with Mr Lynch on 28 October, Mr Lynch was not applying any diligence to his work and told crew:

he didn't give a fuck anymore so I arranged for him to go home on the

30th.

[24] Mr Lynch denies that he had ceased to care about his job and says he was working with the hope of retaining his job. He

says he was not told anyone had said that about him and wonders who it was that said that to Mr Dunlop.

[25] There was still work that Mr Lynch could have done, including the sea trial. Mr Lynch heard nothing further from Talley's during the week after he returned home.

#### *Proposed replacement Chief Engineer sails*

[26] On 31 October 2017, Talley's flew the proposed replacement Chief Engineer to Lyttelton. The Columbia sailed on 1 November 2017 with the proposed new Chief Engineer replacing Mr Lynch and the other Chief Engineer for the Columbia, who was to train the engineer replacing Mr Lynch.<sup>1</sup>

#### *Mr Lynch's terms of employment*

[27] Mr Lynch was employed on an individual employment agreement (IEA) and was subject to Talley's Standard Terms of Employment on Fishing Vessels, which were applicable from 1 October 2017.

[28] Clauses 5.1 and 5.2 of Mr Lynch's IEA provide:

5.1 The company and employee acknowledge that all crew positions throughout the fleet are competitively based and that an individual employee's position on any trip may be higher or lower than held on any earlier trip. Selection for positions for each trip shall be based on the number of

1 At least on that trip.

qualified employees available for each position within the fleet, crewing ratio as applicable to the vessel, experience, skill, on-going evaluation by officers and the company of individual's work practices, attitude and conduct and the company's assessment of the mix of personnel the company considers most likely to achieve objectives for the vessel.

5.2 The company may assign individual crew to different vessels and positions where it considers that necessary or desirable to achieve company requirements or objectives provided however that any such assignment shall not be undertaken so as to deprive an employee of his or her trip off without the employee's consent and in such case the crew member shall be entitled to payment both for the trip off that they would otherwise have enjoyed and normal pay for the trip on that is taken instead.

[29] Mr Hazlett and Rebecca Plum, the human resources manager for the deep-sea division, both gave evidence that when Talley's wishes to redeploy staff to another position and/or another vessel it does not do so without prior consultation with the affected staff.

#### *Attempt to reschedule meeting with Mr Hazlett*

[30] On 30 October 2017, Mr Hazlett went to a food fair in China that Talley's attends every year and did not return to work in New Zealand until Monday, 6 November 2017.

[31] On 6 November 2017, Mr Hazlett instructed Ms Plum to telephone Mr Lynch to arrange a time for him to come in and meet with Mr Hazlett.

[32] When Ms Plum spoke to Mr Lynch on the telephone, she asked him if he was able to come in the following day, 7 November 2017, to meet with Mr Hazlett and Mr Dunlop.

[33] Mr Lynch told her that he did not work for Talley's anymore and therefore would not attend the meeting. Ms Plum explained to him that he had not been dismissed and again invited him to come in and meet Mr Hazlett. Mr Lynch declined, saying that he wanted to leave it at that. He also said he was not interested in talking to Mr Hazlett about the allegations in the letter because it was clear he had been moved on by Talley's.

#### **Was Mr Lynch dismissed?**

[34] The definition of a dismissal is a sending away by an employer. Mr Lynch needs to prove that he was dismissed. Talley's says, instead, that he abandoned his employment when he insisted to Ms Plum that he had been dismissed despite her telling him he had not been.

[35] The essence of abandonment of employment is that an employee leaves their job of their own accord without resigning and without giving any other reasonable explanation for their absence, for example, that they cannot attend work because of illness. An employer generally has a duty, in cases of unexplained absence by an employee, to make reasonable efforts to contact an employee to enquire about why they have not been working.

[36] Mr Lynch says that Talley's had reached a conclusion that he should be redeployed because it had decided his performance was unsatisfactory and his skipper and Mr Dunlop had "lost confidence" in him as Chief Engineer.

[37] Mr Dunlop says that he came to his decision about Mr Lynch's poor performance as Chief Engineer over a period. He had discussed Mr Lynch's performance with Mr Lynch's skipper during a turnaround. In addition, during the dry dock he worked with Mr Lynch mentoring him in his managerial role. Sometimes he gave him constructive criticism and sometimes he gave Mr Lynch tips on how to manage the crew and how to develop confidence. It is clear Mr Dunlop communicated his concerns to Mr Hazlett.

[38] Mr Hazlett's evidence was that he had not made up his mind to replace Mr Lynch as Chief Engineer on the Columbia. It was simply a proposal. He wanted to meet with Mr Lynch before deciding whether to proceed with his proposal to redeploy him on another vessel. He points to the words in his letters, which say, "dismissal is not a proposed outcome of this meeting", to prove that Mr Lynch had no grounds for considering he had been dismissed by Talley's. Instead, he says Talley's was exercising the right it had under Mr Lynch's individual employment agreement to assign crew to different posts and vessels where it considers that necessary.

[39] Ms Plum gave evidence that Talley's wanted to retain Mr Lynch and wanted to find the right position where Talley's could have worked with Mr Lynch's capabilities. She also gave evidence that Talley's approached the other Chief

Engineer of the Columbia with criticism of his work. The result with him was that he accepted the criticism and was keen to make improvements. She says that Talley's had a longer period with him to sort out his underperformance, because he was about to start his trip off.

[40] The problem with that explanation is that the other Chief Engineer did not have his trip off because Mr Lynch was sent home. The other Chief Engineer sailed for the sea trial with the new proposed Chief Engineer, in order to train him. The other Chief Engineer did so without having a meeting with Mr Hazlett to discuss Talley's dissatisfaction with how he had been performing.

[41] Mr Hazlett said that he thought there could be as many as three or four outcomes from the meeting he planned to have with Mr Lynch. One of them was that Mr Lynch might have been able to remain in his role as Chief Engineer on the Columbia. He agreed that the letter set out that he had formed a view as to the likely outcome, but he said he remained open minded. He says that Mr Lynch could have convinced him to keep him on by accepting some responsibility and agreeing that he needed to make some changes.

[42] Mr Hazlett says that despite him, Mr Dunlop and Mr Lynch's skipper having lost confidence in Mr Lynch "it was all up for discussion".

[43] Mr Hazlett says that if Mr Lynch's role changed Talley's would have treated him as if he was continuously engaged, as Chief Engineers are paid on that basis.

[44] Mr Lynch submits that when Talley's cancelled the meeting with Mr Hazlett, then sent him home from Lyttleton without rescheduling the meeting and put the "proposed" replacement engineer onto the trip he expected to be sailing on, along with the other Chief Engineer, he considered he had been dismissed. Talley's call a week later saying he had not been dismissed was too late.

[45] Talley's says Mr Lynch notified it of his abandonment when he spoke to Ms

Plum on 6 November and refused to attend the meeting with Mr Hazlett.

[46] The problem with that analysis is that Mr Lynch's reason for refusing to attend the meeting was that he had been dismissed. That was the reason he gave for not wanting to meet with Mr Hazlett. That is not the same as abandoning your employment.

[47] Talley's sent Mr Lynch back to Nelson and stopped him sailing on the Columbia. These were not Mr Lynch's actions. Talley's did so before having a meeting with Mr Lynch and before consulting with him about whether it was going to change his position from that of Chief Engineer to that of a second engineer and/or change the vessel he worked on. Mr Lynch did not make those proposals.

[48] Mr Dunlop's evidence was that he sent Mr Lynch home on the 30th of October because he had heard that Mr Lynch told crew he "didn't give a fuck anymore". Mr Dunlop did not ask Mr Lynch if he had said that or ask for an explanation, did not try to pull Mr Lynch into line or even tell him why he was sending him home that day when there was work for him to do, such as the sea trial.

[49] Mr Lynch had been told the meeting with Mr Hazlett would be rescheduled. However, no one told him that although the new proposed Chief Engineer was sailing on that trip no final decision had been made that he was no longer a Chief Engineer for the Columbia. No one told him he had not been replaced.

[50] Talley's says the meeting with Mr Hazlett could not be held until he got back from China and that Mr Lynch knew that Mr Hazlett was in China. It is self-evident no meeting could be held before Mr Hazlett got back to New Zealand. However, Mr Lynch said he did not know when Mr Hazlett would want to meet with him. Just because Mr Hazlett was away it does not mean a

meeting could not have been scheduled for when he got back and Mr Lynch informed of the date of the meeting.

[51] Mr Lynch says when he was flown home he “knew the show was over”, that is, he understood he had been dismissed. That was an understandable conclusion in the circumstances.

[52] Talley’s did not contact Mr Lynch for a full week after it sent him home. Ms

Plum then told Mr Hazlett that Mr Lynch believed he had been dismissed.

[53] Submissions for Mr Lynch say that Talley’s could have acted swiftly to correct Mr Lynch’s view that it had not dismissed him by contacting him to assure him he had not been dismissed.

[54] I agree that Mr Hazlett could have contacted Mr Lynch himself to say that he had not dismissed him, and did not understand why Mr Lynch thought he had been

dismissed. He did not do so. He accepted Mr Lynch’s conclusion that he had been dismissed.

[55] I accept that Ms Plum tried to tell Mr Lynch that he had not been dismissed. But Ms Plum had not been involved in any of the communications between him and Talley’s about the redeployment proposed in the letter or subsequent events. She did not send the letter. It was not her confidence in Mr Lynch’s ability that had been lost.

[56] Talley’s evidence was that Mr Lynch was a good engineer but just perhaps not up to the role of Chief Engineer on a vessel of such complexity as the Columbia. Its evidence was that it wanted to retain his skills. However, that does not sit comfortably alongside the fact that Mr Hazlett did not contact Mr Lynch to assure him of the fact Talley’s had not dismissed him and wished to retain his services.

[57] Nor does it sit comfortably alongside the fact that Talley’s paid Mr Lynch up to and including 30 October 2017 but not for the week after that, despite considering him to have been employed during that week. Talley’s evidence is that it would have paid him for that week if he had not conveyed what he did to Ms Plum. However, once it learned that he was not coming back it decided he should not be paid for that week.

[58] Talley’s considered Mr Lynch had abandoned his role when he refused to meet Mr Hazlett. He refused on 6 November 2017. If that were the case, Talley’s would have been bound to pay him for that week after the 29th when it believed he was still working and waiting for a meeting with Mr Hazlett.

[59] A fair and reasonable employer, acting in good faith in terms of its communication with an employee, could not have decided to leave Mr Lynch with the idea that it had dismissed him when it considered it had not dismissed him and wanted him to continue working for it, albeit likely in another role and on another vessel.

[60] In all the circumstances, I do not consider that a fair and reasonable employer could have concluded that Mr Lynch had abandoned his employment.

[61] Talley’s intention in relation to Mr Lynch likely did not start as an intention to dismiss him or have him leave its employment. However, I consider Talley’s actions, as set out above, starting with Mr Hazlett’s letter, when taken together amount to it sending Mr Lynch away. Therefore, I consider Talley’s dismissed Mr Lynch.

*Was the dismissal justified?*

[62] Now that Mr Lynch has satisfied me that Talley’s dismissed him, Talley’s needs to prove that it acted as a fair and reasonable employer could have acted in all the circumstances at the time.

[63] I need to assess Talley’s actions objectively when applying the above test.

[64] A fair and reasonable employer would comply with s 103A(3) of the Act, which sets out basic procedural requirements that employers are expected to meet when they make decisions that affect an employee’s employment.

[65] A fair and reasonable employer will also treat its employees in good faith, in line with its obligations under s 4 of the Act.

[66] Talley’s concerns about Mr Lynch were concerns about his performance. The letter cited problems with his time management, problem solving skills, leadership and general engineering ability.

[67] It says it also had concerns about the other Chief Engineer. I accept that Mr Hazlett spoke to Mr Lynch at the end of the June debrief about lifting his performance. Mr Hazlett says that he told Mr Lynch that if he did not improve his position would be at risk. Mr Lynch did not come away from that discussion with the same understanding as Mr Hazlett. He was not as aware as Mr Hazlett thinks he should have been that his position was at risk. There was no documentation of that discussion and apparent informal warning.

[68] I consider that in Mr Hazlett’s letter he reached a conclusion through an unfair process. That conclusion was that Talley’s had lost confidence in Mr Lynch in his role. Talley’s moved directly to a proposed solution. Mr Lynch says that the effective

proposed demotion to a lesser role without hearing from him and Talley's subsequent actions made him feel their employment relationship was over.

[69] Talley's was not proceeding on the basis that Mr Lynch had committed any serious misconduct but due to his performance. Mr Hazlett's letter suggests there were problems with Mr Lynch's general engineering ability. However, Mr Dunlop's evidence is that Mr Lynch is a very capable engineer.

[70] Talley's did not carry out the kind of fair process that is required of an employer when an employee's performance is not up to the standard the employer requires. It needed to be very specific about what it required Mr Lynch to change, give him support and/or coaching to meet its requirements, give him time to meet those requirements and provide an objective way of measuring whether he had met the performance standards set. It needed to give him feedback on his progress, or lack of it. However, it did not do that.

[71] A fair and reasonable employer could not have failed to comply with the process set out in s 103A(3) of the Act. Talley's failed to use that process.

[72] Section 4(1A) of the Act setting out the mutual duty of good faith, requires Talley's to have been constructive and communicative with Mr Lynch and to maintain a productive employment relationship with him. It required that of Mr Lynch too.

[73] I do not consider Talley's behaviour to Mr Lynch before it delivered the letter to him or afterwards was sufficiently communicative. In sending Mr Lynch home Talley's led him to think he had been dismissed.

[74] I do not consider that Talley's intentionally dismissed Mr Lynch.

[75] Mr Hazlett's letter concluded with the words that dismissal was not going to be an outcome. However, Talley's subsequent conduct was at odds with that. I consider Talley's constructively dismissed Mr Lynch.

[76] In the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd 2*, the Court stated that there are three main circumstances where a constructive dismissal may arise:

(a) Where an employer gives an employee an option of resigning or being dismissed;

(b) Where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;

(c) Where a breach of duty by the employer leads an employee to resign.

[77] I consider the third of these categories applies.

2 [\[1985\] ACJ 963](#)

[78] Where an employee relies on a breach of an implied or express duty by the employer as cause for the resignation, the breach must be of such a character as to make the employee's resignation foreseeable.

[79] The very nature of a claim for constructive dismissal is dependent on the events that preceded it. The focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach of the employer's duty or other actions by the employer.

[80] The typical third category scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. In such a case, it is not necessary to show that the employer intended any repudiation of the contract.

[81] I consider Talley's actions, beginning with communicating the conclusion that it had lost confidence in Mr Lynch and proposed to replace him, along with its subsequent actions culminating in sending him home because it decided he "didn't give a fuck", were without reasonable and proper cause. The actions so seriously damaged the relationship of trust and confidence from Mr Lynch's perspective that it should have been foreseeable to Talley's that Mr Lynch might resign.

[82] Mr Lynch cancelled his contract of employment with Talley's when he told Ms Plum he would "leave it at that". It was too little, too late for him. Talley's was going to put him in a lesser role, it had not discussed that or consulted him before proposing it, and he "had lost interest". His resignation was based on the fact that Talley's had treated him poorly and he had lost trust and confidence in Talley's as much as it had in him.

[83] I consider that Talley's acted in a way and made decisions that no fair and reasonable employer could have made. It was not a justified dismissal.

## **Remedies**

### *Compensation*

[84] Mr Lynch claims \$20,000 compensation for humiliation, loss of dignity and injury to his feelings. Mr Acland submits that the non-financial harm to Mr Lynch is moderately severe.

[85] Mr Holden's evidence was that when he handed Mr Lynch the letter Mr Lynch became upset and distressed. He says Mr Lynch felt he was bearing the brunt of the blame for the state of the Columbia unfairly.

[86] Mr Dunlop acknowledged that after Mr Lynch got the letter he was obviously "fairly hacked off." He said Mr Lynch was expressing his displeasure at how everything was going and pointing out that he had been unfairly singled out.

[87] Mr Lynch's evidence is that he was really disappointed, upset and hurt. He says he was proud of the work he did on the Columbia and the criticism he received followed by being replaced without an opportunity to have his say made him feel unwell.

[88] Mr Lynch describes feeling "quite sick in my gut" and chewing it over at night for weeks. He had trouble sleeping. He says it was a stressful time.

[89] He says that the negative effects on him have been increased because it is a small industry in a small town and there has been gossip going around about him. He says he has friends he has worked with on the boats tell him they had been instructed not to talk to him.

[90] Because of the "stress and gossip" of the industry he felt it was better to stay away from the industry for a while.

[91] Taking all the evidence into account, as well as recent comparable cases, I consider that Talley's should pay Mr Lynch \$14,000 in compensation.

### *Lost wages*

[92] Section 123(1)(b) of the Act allows me to order Talley's to reimburse Mr Lynch for the whole or any part of wages Mr Lynch lost as a result of his grievance. Section 128(2) of the Act provides that I must order Talley's to pay Mr Lynch the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. Since Mr Lynch obtained work in the three months after his dismissal, I need to award him his actual lost remuneration for the three months after his dismissal. That is, unless there is another intervening cause of his losing money over that period.

[93] Mr Lynch started working for his family on their orchard after Talley's dismissed him. He maintains machinery for the orchard and does other casual work for the business. The work is not fulltime.

[94] Talley's submits that engineers for fishing vessels are hard to come by and that if Mr Lynch had carried out an adequate job search he would have been likely to get another role in the industry quickly. It submits that Mr Lynch did not adequately mitigate his loss.

[95] Mr Lynch's evidence is that there were no jobs he could apply for advertised with Sealord or any other fishing company at the time. He also says that because of the criticism made of him in Mr Hazlett's letter he was not sure how he could go back and work in the fishing industry in any event. He says he lost confidence in his abilities and was troubled by the gossip going around about him within the industry.

[96] I accept that Mr Lynch lost confidence in his abilities as an engineer on fishing vessels. I accept that he had lost confidence overall as well. I am satisfied that Mr Lynch adequately mitigated his loss, given his loss of confidence, rumours going around about him and the other personal effects the dismissal had on him.

[97] I order Talley's to pay him his lost wages only for three months from 30

October 2017, less the amounts earned from his employment during that time. The nett amount sought is the nett amount awarded - \$19,466.62. Talley's may instead pay the relevant gross amount and leave Mr Lynch to pay his own income tax on the amount.

[98] It appears that Talley's may not have paid Mr Lynch for holiday pay in his final pay. That is because it did not calculate a final pay. If there is any holiday pay owed, Talley's must calculate and pay Mr Lynch for that. The parties should seek to agree on this point. If that is not possible, Mr Lynch may come back to the Authority for a determination on that issue.

### *Contribution*

[99] Having determined that Mr Lynch has a personal grievance s 124 of the Act requires me to consider the extent to which Mr Lynch's actions contributed to the situation giving rise to his personal grievance. If there was a causal connection between

those actions and the situation that gave rise to the dismissal and if those actions so require, I must reduce the remedy that would otherwise be awarded.

[100] Talley's had engineering reports from Mr Dunlop that pointed to a lack of adequate planned preventative maintenance on the Columbia over the time between dry dock repairs. The vessel had essentially been fully refitted at the previous dry dock. Mr Lynch had been in the Chief Engineer's role for about two years, which was less than half the time since the previous dry dock. Mr Hazlett's concerns about Mr Lynch were elevated over his concern about the other Chief Engineer when the captain said he was not sure that Mr Lynch could remain his Chief Engineer.

[101] However, the type of dismissal, the lack of investigation and gathering of evidence and the lack of a fair performance management process mean that I am not satisfied that Mr Lynch contributed to the situation leading to his dismissal in any way, let alone a blameworthy way. Therefore, I do not reduce the remedies on the grounds of contribution.

#### *Interest*

[102] Mr Lynch claims interest on his lost wages and on the compensation award. Clause 11 of Schedule 2 of the Act allows the Authority discretion to award interest "in any matter involving the recovery of any money" in accordance with [Interest on Money Claims Act 2016](#). The part of this matter involving the recovery of money is the award for lost remuneration, not the compensation. The amount awarded as compensation only becomes payable when this determination issues.

[103] I consider it is a suitable case to award interest on the lost wages awarded.

[104] The interest due on the nett amount of \$19,466.62 calculated under the [Interest on Money Claims Act](#) is \$376.24 from 6 February 2018, three months after Mr Lynch's dismissal, to 31 August 2018. Both amounts must be paid to Mr Lynch.

#### **Costs**

[105] I reserve the issue of costs. The parties should seek to agree on costs. If that is not possible, the party applying for costs can put in written submissions within 28 days of the date of this determination. The other party has a further 14 days within which to make its submissions.

Christine Hickey

Member of the Employment Relations Authority