

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 206
3140241

BETWEEN ELAINE NAIDU-FRANZ
Applicant
AND SANFORD LIMITED
Respondent

Member of Authority: David G Beck
Representatives: Timothy Jackson and Matthew Bonniface, counsel for the
Applicant
Kylie Dunn and Lucy Smith, counsel for the Respondent
Investigation Meeting: 20 and 21 April 2022 in Timaru
Submissions Received: 21 April 2022 from applicant and respondent and further
information from parties on 3 and 5 May 2022
Date of Determination: 20 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Elaine Naidu-Franz was employed by Sanford Limited (Sanford) in Timaru as a specialist HR Recruitment Partner/HR Administrator from 30 September 2019 until she was summarily dismissed on 5 November 2020.

[2] Ms Naidu-Franz claimed her employer had no substantive reasons to justify summarily dismissing her and that this was preceded by an unjustified suspension. Ms Naidu-Franz asserted she should have been afforded an ongoing opportunity to address what she largely conceded as legitimately identified performance concerns and that in making the decision to dismiss her, Sanford did not sufficiently consider workload pressures and indications of personal stress issues impacting on her performance.

[3] Sanford by contrast, contend the dismissal was carried out in a procedurally fair manner, no suspension occurred and that an investigation confirming Ms Naidu-Franz's neglect of key duties was sufficiently serious to warrant summary dismissal given the position occupied and the identified requirements of such.

[4] The parties attended mediation but the matter remained unresolved.

The Authority's investigation

[5] The investigation meeting took one and a half days. I received written and oral evidence from: Elaine Naidu-Franz and for Sanford, Rebecca Campbell, HR Business Partner and Rebecca Stewart, General Manager Human Resources. Ms Campbell was Ms Naidu-Franz's direct report in the Timaru office. Ms Campbell reported to Ms Stewart who is located at Sanford's Auckland head office.

[6] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the helpful submissions and information received from both parties and refer to them where appropriate and relevant.

Issues

[7] The issues to be decided are:

- (a) Was Ms Naidu-Franz unjustifiably dismissed?
- (b) If Sanford's actions in dismissing Ms Naidu-Franz do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering the claims for:

(i) Lost wages under s 123(1)(b) of the Act.

(ii) Compensation under s 123(1)(c)(i) of the Act.

(c) If Ms Naidu-Franz is successful in all or any element of her personal grievance should the Authority reduce potential remedies due to any contributory conduct?

(d) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[8] Ms Naidu-Franz commenced working for Sanford in September 2019 on a fixed term basis and was then made permanent from 1 June 2020. The position exclusively involved the recruitment of a pool of independent contractors capable of working as share fishers and specialist crew for Sanford's deep-sea fishing fleet operating out of the port of Timaru (normally ten vessels that spend approximately forty days at sea during each voyage).

[9] Ms Naidu-Franz confirmed in evidence, that prior to working for Sanford, she had significant experience in the recruitment industry including working for a high-volume recruitment agency in a primary industry land-based setting. In addition, Ms Naidu-Franz said she had worked temporarily for NZ Police assisting with interviews and character reference vetting applications for gun licences and she previously undertook administration, business analysis, project management and events management roles.

[10] The role Ms Naidu-Franz undertook at Sanford included: conducting pre-employment checks, interviewing applicants to determine suitability, setting up medicals/drug testing and arranging Ministry of Justice (MOJ) criminal conviction checks. The position was the subject of an individual employment agreement and a job description that described the main purpose as:

... to provide a high level of recruitment and administrative support primarily for the Timaru HR operations, through accurate and timely data input, driving recruitment processes and systems and maintenance of information.

[11] According to Sanford witnesses, Ms Naidu-Franz demonstrated an aptitude for the work and established good working relationships with co-workers. A key liaison task was engaging with Sanford's ship captains and the payroll team, around crew needs and suitability requirements including being aware of the unique onboard environment and crucial health and safety issues. In the Timaru office, Ms Naidu-Franz worked alongside another recruitment specialist (who formerly undertook her role), an onshore vessel manager and her direct report, Ms Campbell.

[12] In early July 2020, following a high-profile incident involving Sanford fishing crew being convicted for involvement in a serious assault situation in a Falkland Islands public house, Sanford had cause to review the robustness of their recruitment process. The review identified amongst other issues, that Ms Naidu-Franz had failed to complete pre-employment criminal record checks for several crew including one crew member involved in the incident being engaged whilst he was still on parole – a situation Sanford only later became aware of.

[13] Ms Stewart says the approach Sanford's HR team took to the identified recruitment deficiencies was to accept ownership and work on improving and re-setting processes. As part of this exercise, Ms Naidu-Franz was asked to assist in drawing up guidelines to avoid a repeat of a situation she had contributed to. These guidelines updated an earlier draft of guidelines termed a: "People Engagement Map" that Ms Naidu-Franz had been provided in October 2019 and were now renamed "Draft – Sanford 2020 DW Sharefisher Recruitment Process".

[14] Ms Campbell indicated that on 8 September 2020 she met with Ms Naidu-Franz and took her through the new recruitment document and discussed the paramount importance of completing MOJ criminal record checks and discussing with co-workers (including vessel management) where the checks showed up worrying past criminal activity. Ms Naidu-Franz did not contest this evidence. Ms Campbell conceded no specific written policy existed about approaching MOJ checks, claiming a subjective approach was required on a 'case by case' basis but no specific training was provided on how to interpret criminal offences and their level of seriousness.

[15] As part of the Falkland Islands incident review, Ms Naidu-Franz was asked to detail what recruitment process she used and did so, by way of a comprehensive email to

Ms Campbell of 3 July 2020. The email included an outline of how Ms Naidu-Franz approached her decision-making on disclosed criminal convictions as follows:

If a candidate declares any criminal convictions during the course of the interview, a determination is made regarding their suitability based on several factors:

- Type of charges or convictions
- Last occurrence of offending or conviction
- Type of sentence
- Work history since last conviction

Each candidate is assessed on a case by case basis. There are candidates that made mistakes when they were younger and have not reoffended because they were given the opportunity to turn their lives around. There are candidates that have served sentences more than 5 years ago and have not reoffended. They learn from those experiences and deserve to have a second chance at life because they completed their punishment as set out by our justice system whether it is the payment of a fine, community service or imprisonment. Candidates that serve time in prison are often remorseful of the actions they have taken and complete courses during their time in prison to better themselves to prevent reoffending.

Candidates that are able to be gainfully employed after having completed their sentence allows them to build a work history and the ability to prove that they are productive members of society. If they have shown a consistent history of work, there would no reason why we would not accept them as suitable candidates. For example, (name omitted) served time in prison however, since he was released, he was gainfully employed for approximately two years prior to being engaged on the San Aspiring. He has been engaged on the San Aspiring for two years with no incidents. His skippers have consistently given good feedback about him as a person, his work ethic and his performance at work.

[16] In addition, Ms Naidu-Franz's 3 July email outlined a view that those suitable for employment in a sea-going environment could "prove that their mistakes or the past" and stigma of criminal conviction had been put behind them.

[17] Ms Naidu-Franz alluded to there being no specific written guidance on how to approach MOJ conviction records. Ms Naidu-Franz however, acknowledged she was aware of the necessity to consult with Ms Campbell, the vessel skipper or the vessel manager if in any doubt around candidate suitability including how she was to interpret criminal record checks but she claimed she was uncertain about what the 'trigger point' was for escalation beyond her own judgement.

[18] Ms Campbell recalled taking Ms Naidu-Franz through the new engagement process and its requirements at a meeting with her on 8 September 2020. Ms Campbell says she placed emphasis on the need to manage risks. Ms Campbell says she found Ms Naidu-Franz to be hard-working and positive and that she got on well with others. Ms Campbell says no performance or workload issues were apparent until the Falkland Islands incident. She described weekly HR meetings and an informal weekly team catch up on Fridays that Ms Naidu-Franz attended but apart from this, Ms Campbell says she did not micro-manage Ms Naidu-Franz but observed she appeared to have a good working relationship with vessel managers. No performance appraisal had been completed for Ms Naidu-Franz during her period of employment (it had been delayed).

[19] Ms Campbell indicated working hours had 'peaks and troughs' and were focused upon 53 vessels' 'turn arounds' each year.

[20] Ms Naidu-Franz also alluded to a general approach she applied from a previous recruitment role, that minor non-custodial convictions beyond two years ago could normally be disregarded.

[21] I had no evidence or documentation from Sanford that the suggested approach Ms Naidu-Franz had outlined in her 3 July email was challenged or deemed unacceptable but both Sanford witnesses claimed there was constant dialogue around recruitment needs on the importance from a health and safety perspective, of candidate suitability (including regular weekly team meetings that Ms Naidu-Franz often attended). However, Ms Campbell could not recall Ms Naidu-Franz discussing any issues with her on interpreting the level of seriousness of criminal offences detailed in any MOJ checks.

The San Granit incident and associated issues

[22] Leading up to the sailing of the San Granit deep sea fishing vessel on Friday 16 October 2020, Ms Naidu-Franz was responsible for completing crew placements including pre-voyage drug screening. The ship sailed at 5pm on the 16th and Ms Naidu-Franz says she was under pressure to complete all placements in a timely manner – a situation exacerbated by her desire to leave at mid-day on the 16th so she could drive to Nelson for a planned long weekend break including leave on the following Monday. Ms Campbell conceded that she gave permission for Ms Naidu-Franz leaving early and Ms Campbell partially facilitated this by ensuring drug screening tests took place after Ms Naidu-Franz had left.

[23] Unfortunately, on 19 October the San Granit had to return to shore after an incident on board where a crew member confronted another senior crew member with a weapon. Ms Campbell and Ms Stewart who had flown from Auckland, dealt with the aftermath of the incident.

[24] It was not clear how much detail Ms Naidu-Franz became aware of relating to the San Granit incident on 19 October whilst she was still on leave but Ms Campbell recalled being contacted by Ms Naidu-Franz about it.

[25] Ms Naidu-Franz returned to work on Tuesday 20 October and attended an HR meeting convened by Ms Stewart and Ms Campbell and a co-recruiter, to be debriefed on what had led to the San Granit incident. Ms Stewart says she explained at this meeting, that she would be conducting a wider review of the recruitment process undertaken by Ms Naidu-Franz for the San Granit after Ms Naidu-Franz initially indicated she had adhered to the agreed process arising from the Falklands incident.

[26] Ms Stewart recalled taking a break for lunch from the 20 October meeting and driving to a local supermarket with Ms Naidu-Franz, at which point she said Ms Naidu-Franz got upset and began crying. Ms Stewart says she was aware at the time that Ms Naidu-Franz had been grieving about the relatively recent death of her father and upon enquiring what was upsetting her, Ms Naidu-Franz said she was still struggling with grief, had a lot on her plate and was having other personal issues. Ms Stewart says that Ms Naidu-Franz also indicated her workload was causing her stress but could not recall that factor being previously raised (Ms Campbell gave similar evidence on the absence of workload

concerns being identified). Ms Stewart says she encouraged Ms Naidu-Franz to take discretionary paid leave as she was concerned about her emotional well-being. In the same conversation, Ms Stewart indicated the San Granit crew recruitment process would be investigated but she suggested that could wait until Ms Naidu-Franz's paid discretionary leave was completed.

[27] Ms Naidu-Franz responded, indicating she would like to take leave for an unspecified period. Although initially indicating a disadvantage grievance contending that she had effectively been suspended without due process, Ms Naidu-Franz abandoned this element of her claim during the investigation meeting.

[28] When put to her during the investigation meeting, Ms Naidu-Franz who initially did not recount the 20 October meeting and its aftermath in her written brief, expressed concern that it was now being recounted - considering it to have been an 'in confidence' discussion in her written brief of evidence in reply. Ms Naidu-Franz however, accepted Ms Stewart's recollection of the conversation during the trip to the supermarket as accurate.

[29] In a letter of 21 October Ms Stewart detailed twin concerns: Ms Naidu-Franz's "physical and mental wellbeing" and her performance and decision making in regard to the "recent event on the San Granit". Ms Stewart then suggested the offered discretionary leave continue up to 30 October and detailed a free EAP provider counselling support option or as an alternative, an offer to fund up to three private counselling sessions. Ms Stewart then indicated:

Upon your return to work and given the serious nature of the recent event on the San Granit, we will be formally investigating the event and any involvement you may have had in the recruitment process, including the Deep Water documentation required to support our business requirements in this area.

[30] Ms Naidu-Franz took the rest of the week off and returned the following week, saying she was anxious to resume working to address the issues raised and demonstrate her ongoing competency.

[31] In the interim period, Ms Campbell and Ms Stewart first reviewed the recruitment documentation pertaining to the person involved in the San Granit incident. Of immediate concern was the MOJ criminal record check and the timeliness of Ms Naidu-Franz obtaining

such. It became apparent from Sanford's perspective, that the crew member involved in the incident had an extensive criminal record. The interpretation of the record check raised a concern about Ms Naidu-Franz's judgement as it also emerged that she had failed to consult about it with co-workers, including the vessel skipper.

[32] In addition, it was discovered that Ms Naidu-Franz had failed to be cautious about two additional factors - the person involved in the incident had only disclosed a traffic conviction in their job application and a brief verbal reference check had indicated a former employer's view that the person may not be suitable for working at sea.

[33] In further reviewing Sanford's internal personal information management system (Mango), Ms Stewart and Ms Campbell found seventeen San Granit crew members did not have correct documentation recorded, this including some uncompleted or not recorded MOJ checks. Sanford explained Mango was a key tool to be accessed for crew information for a variety of purposes including seaboard management being able to access it. The requirement to maintain accurate records was set out in Ms Naidu-Franz's job description.

[34] The wider concerns led Ms Stewart to detail such in a letter to Ms Naidu-Franz of 30 October 2020 headed "Invitation to Investigation/Disciplinary Meeting". The letter was split into two components – the first detailed allegations around Ms Naidu-Franz's recruitment of the person involved in the San Granit incident and then the second concern stemming from the wider audit on documentation of seventeen San Granit crew members and others (including allegations involving inadequate MOJ checks, pre-engagement consultation issues and lack of recording details in Mango).

[35] The letter provided more detail of the San Granit incident and indicated:

If the above allegations are proven, your conduct is of serious concern because of the integral role you played in the recruitment process. The above alleged allegations may have contributed to the serious incident on board the San Granit.

[36] The letter further noted the "significant cost to the business, of approximately \$200,000" caused by the vessel having to abort fishing and return to port (a similar cost impact had occurred after the Falkland Islands incident). A meeting was sought on 3 November. Ms Stewart indicated Ms Campbell would also attend and warned it "may result in disciplinary action being taken against you, up to and including termination of your

employment, this being the most serious potential disciplinary outcome...” and that Ms Naidu-Franz could obtain representation or bring a support person to the meeting. EAP counselling support was again offered. I observe the letter was well constructed and was specific as to the issues of concern and it contained attachments relevant to Sanford’s inquiries. At the point in time the letter was received, Ms Naidu-Franz had returned to work and no suspension was suggested.

Ms Naidu-Franz’s initial response

[37] Ms Naidu-Franz obtained legal advice and her counsel in consultation with her on content, wrote to Ms Stewart on 3 November confirming his client would attend the scheduled 2 pm meeting of that day with her husband as support. The letter then made comment by way of an initial response, in summary contending that:

- No performance issues had previously arisen in twelve months of employment.
- The San Granit skipper had been late to detail crew requirements.
- Policies covering recruitment practices were still in draft form and no detailed guidelines were provided for interpreting MOJ criminal record checks.
- Ms Naidu-Franz rejected any suggestion of well-being concerns and indicated “there appears to be nothing to suggest such concerns”.
- The predominant allegation appeared to be the San Granit incident and Ms Naidu-Franz’s recruitment process that “could have contributed to that incident”.
- Ms Naidu-Franz first lacked sufficient information on the incident “to be able to respond and in particular, to the extent our client’ role might be regarded as potentially causative...” and

... it draws a long bow to level allegations of this nature solely as a result of our client having a role in recruitment and when our client is in the dark about direct causation. Second as foreshadowed, how can any action by our client be said to have contributed?

- Due to time constraints, the actual content of the MOJ check, Ms Naidu-Franz’s skill base and lack of specific guidance and the information available, the recruitment of

the person involved in the San Granit incident, Ms Naidu-Franz's approach "was reasonable and not in breach of any obligation".

- Ms Naidu-Franz had had insufficient time to consult with the vessel manager or senior officers "as is usually the case".
- Ms Naidu-Franz had to attend to other pressing recruitment issues and did not have sufficient administrative or managerial support to cope with her busy workload.

[38] Counsel's letter concluded that Ms Naidu-Franz would meet and discuss all aspects of the matters at issue but in his view, the focus should be on the level of systemic support Sanford was not providing.

Comment

[39] It emerged as the investigation proceeded that Ms Naidu-Franz and her counsel became fixated on their belief that Sanford were solely attempting to establish that Ms Naidu-Franz caused the incident on board. Counsel did not assist by focusing on 'causation' in the sense of it being akin to a component of a criminal charge. By contrast, I did not interpret the matter this narrowly and could see no relevance in further investigation of any other factors involved in the San Granit incident other than it had occurred. This is because I accepted Sanford counsel's submission, that the concern Sanford had was the overall recruitment process Ms Naidu-Franz had adopted, including: the judgement that the MOJ check did not warrant discussion with co-workers or the vessel manager or crucially the San Granit skipper and, on a broader but perhaps more serious basis, numerous recruitment deficiencies identified during their investigation.

The 3 November 2020 meeting

[40] The 3 November meeting was by mutual consent, recorded and the subject of an agreed transcript (all following quotes are from the transcript). The meeting opened at 2 pm with Ms Stewart clarifying that the incident on the San Granit was not under discussion regarding what had triggered the crew member to do what they did, rather that Ms Naidu-Franz's recruitment practice was under scrutiny.

[41] The first matter discussed, was an open question of how Ms Naidu-Franz had recruited the crew member involved in the incident. Ms Naidu-Franz explained the application came through Sanford's Trade Me portal and she used standard pre-screening questions, considered the applicant had spoken to a relative who worked on the San Granit about the working environment, the applicant's recent work history and that only drink driving convictions were disclosed despite Ms Naidu-Franz apprising the applicant of an upcoming MOJ criminal record check.

[42] Ms Naidu-Franz then agreed to provide her hand-written interview notes. She then said the applicant concerned was provided with pre-engagement paperwork about two weeks prior to engagement including the MOJ criminal record access authorisation form for return and such was promptly returned. Reference checking was then conducted and Ms Naidu-Franz conceded she had "left it for a wee bit" before completing this step. She indicated one reference was "average" and "one was quite good" that led to a decision the applicant would be a good fit. Ms Campbell noted the reference checks could not be found in Mango and Ms Naidu-Franz, after saying she had found them on her lap-top, agreed to later provide such.

[43] When pressed why interview notes were not uploaded or scanned into Mango, Ms Naidu-Franz was equivocal, first saying it was not her practice to scan notes then saying she had all the stuff ready to be uploaded.

[44] Ms Naidu-Franz then described sending and receiving the MOJ check for the person involved in the San Granit incident and noted it had been quite late in being returned but she did not state precisely when it had been received completed or why it had been delayed.

[45] The MOJ check discussed above was then discussed in detail. Ms Naidu-Franz asserted she did not "have parameters to work with" or set policies but she assessed first that the last criminal charge was 2018 involving a breach of a community sentence linked to earlier motor vehicle offences. Ms Naidu-Franz then described how she had placed emphasis on no further infractions being recorded and that more serious offences were historical and non-custodial in nature. Ms Naidu-Franz said she generally did not look at older offences, indicating "because at the end of the day people do change and we all make mistakes when we were younger".

[46] When pressed by Ms Stewart about the negative ongoing pattern of the person's MOJ check, Ms Naidu-Franz reiterated her lack of guidance and specialist training and suggested the presiding Judge had indicated the sentence had been served and exclaimed "are we punishing people for completing their sentences?". After a further exchange, Ms Naidu-Franz posited that nothing had suggested that the applicant concerned would later be involved in an onboard confrontation, including a Sanford occupational nurse's pre-voyage medical and general mental health capability assessment, that had been very positive.

[47] Ms Stewart then traversed the post-Falkland Islands incident learning process and Ms Naidu-Franz suggested the discussion of MOJ criminal record content beyond custodial sentencing being a 'red flag', had not been sufficiently dealt with.

[48] The conversation then shifted to other crew members' MOJ checks and recruitment details not being recorded and lessons from the Falklands debrief not being adopted. Ms Naidu-Franz raised workload issues and lack of administrative support but when asked by Ms Stewart if she had sought assistance regarding MOJ checks and administrative support, she responded: "No I haven't" and had not thought about asking for help.

[49] Ms Stewart despite several sometimes-discursive questions, did not at this point in the meeting, ask Ms Naidu-Franz for her explanation on the issue of her failure to consult with management about the MOJ check of the person involved in the San Granit incident and others.

[50] Toward the end of the meeting Ms Naidu-Franz pressed Ms Stewart for an early outcome, saying she wanted to get on with her job. A short break occurred sought initially by Ms Stewart saying she needed to collect her thoughts and check what further questions she needed to ask. I do observe Ms Stewart rather clumsily suggested that Ms Naidu-Franz's counsel was a potential barrier to the matter being swiftly concluded. However, Ms Stewart did then suggest a path forward involved Sanford responding to Ms Naidu-Franz's counsel, the provision of further information from Ms Naidu-Franz and a review of further documentation to be the subject of a meeting two days hence.

[51] The meeting reconvened at 3:15pm, with Ms Stewart saying she needed to go over a "couple of things for clarification" and she reiterated a request for copies of the references

Ms Naidu-Franz had documented and post meeting screening notes and a detailed timeline on the recruitment of the person involved in the San Granit incident. There followed an exchange about other recruitment information not being uploaded to Mango in a timely fashion.

[52] Ms Stewart then asked, following the lessons learnt in the aftermath of the Falkland Islands incident, “when would you think is the right opportunity to engage a vessel manager or B2 (Rebecca Campbell) or James who sat in the role to help you?”

[53] Ms Naidu-Franz’s response suggested she had only in the last week accepted the need to consult on any recruitment concerns and had no explanation why she had previously not done so.

[54] Ms Stewart then pressed further on her confusion between the discussion she had had with Ms Naidu-Franz on 20 October that suggested ‘burn out’ was at issue and her counsel’s letter that seemed to suggest an absence of outside work pressures impacting on Ms Naidu-Franz. Initially, Ms Naidu-Franz responded saying she “was at burn out point”. Ms Stewart then suggested she was aware of this and spoke of three co-workers she knew Ms Naidu-Franz had related concerns to.

[55] Ms Naidu-Franz after being pressed again by Ms Stewart about the incongruity of her counsel’s comments, suggested that her weekend break had largely alleviated her stress and she had arrived back at work in “a really good head space”. Ms Naidu-Franz then confirmed her distress expressed to Ms Stewart on 20 October, was largely situational and caused by the realisation she was under investigation for the San Granit incident.

[56] Ms Naidu-Franz’s husband then detailed his concerns about Ms Naidu-Franz’s working hours including weekends and the difficulty of her getting administrative work completed when subject to competing pressures. During the investigation meeting Ms Naidu-Franz said she frequently worked Saturday mornings to complete work but evidence supplied by Sanford, based on Mango log in records, suggested that on average Ms Naidu-Franz only worked a weekend once a month. Ms Naidu-Franz’s counsel countered with a memorandum suggesting weekend work may have been completed without logging into Mango. In the absence of decisive evidence from either party, I form no conclusive view, except to note that Ms Naidu-Franz did not produce any evidence of

raising issues with Sanford about overtime or core working hours being excessive and did not identify this as a problem during the disciplinary process. In questioning during the investigation meeting, Ms Naidu-Franz recalled discussing with Ms Campbell her workload pressures and coping with tight timeframes but conceded that she had no issues in her working relationship with Ms Campbell.

[57] Ms Stewart responded by emphasising a team effort was involved and then returned to her concerns about the person in the San Granit incident and Sanford's view of Ms Naidu-Franz's poor judgement of the criminal record check and other recruitment procedural errors the investigation had thrown up including her inability to properly review such due to inaccessible or poorly stored documentation.

[58] In summing up Sanford's concerns, Ms Stewart broadly indicated her perspective that the initial investigation was leading to a finding that Ms Naidu-Franz despite latterly claiming inadequate administration support, had engaged in a failure to follow "lawful and reasonable instructions post the Falkland Islands incident". Ms Stewart then stressed she needed further information from Ms Naidu-Franz before coming to a decision.

[59] At this point in the meeting, Ms Naidu-Franz again pushed for an early resolution indicating: "Yea, let's just do it, there's no point slowly peeling this off. Let's just get it done because whatever the results going to be, its going to be the result". Ms Stewart responded by emphasising due process had to be followed, she would not be rushed and that she was seeking further information. The parties agreed to meet again on the morning of 5 November and Ms Naidu-Franz was offered but declined, a day off work to prepare.

[60] Ms Stewart also responded to Ms Naidu-Franz's counsel by emailed letter of 4 November around mid-day, emphasising:

I would like to confirm this investigation is in relation to the recruitment process and Share Fisher documentation that is required to meet our business compliance obligations. This includes the lack of record keeping required, that is alleged to have not been followed by Elaine.

[61] The letter then clarified that the San Granit incident was merely a catalyst for wider concerns being uncovered and that the investigation of the actual incident was a separate process not currently involving Ms Naidu-Franz. The letter then summarised issues discussed during the 3 November meeting and detailed the 5 November meeting would

proceed. At the conclusion of the letter, Ms Stewart stated she intends to review documentation that had been provided by Ms Naidu-Franz and her initial responses and if “one or more of the allegations are upheld around the recruitment process and documentation required I will discuss with Elaine what disciplinary sanction I may propose”.

[62] At 5:23 pm on 4 November, Ms Naidu-Franz by email, provided Ms Stewart some information related to the recruitment of the person involved in the San Granit incident.

5 November meeting

[63] Commencing 10 am on 5 November, the same parties from the 3 November meeting reconvened. This meeting was also recorded and subject of an agreed transcript (the following quotes come from this transcript). Ms Naidu-Franz opened, by indicating she had instructed her counsel to hold off in responding to Ms Stewart’s 4 November letter, as she wanted to have a conversation first and then said:

I will put my hand up for the mistakes I did make in the paperwork side of it and the procedural side of it, but um for what happened on the vessel, I can’t take full responsibility for it ... because I don’t actually know how that came about.

[64] Ms Naidu-Franz then indicated she had told her counsel to hold off with the letter response from counsel that she had seen in draft - saying “because I wanted to get a better gauge of where we’re looking to land on all of this stuff here” and later that: “I wanted to say my piece 1st and get an indication of where this is going to land and based off that I will make a decision on whether we send that response or not”.

[65] There then followed a further discussion where Ms Stewart again, had to draw a distinction between the San Granit incident and Sanford’s concerns about Ms Naidu-Franz’s wider recruitment practices before she could get to the point of going through her letter of 4 November and putting further questions.

[66] Ms Naidu-Franz appeared to then display an understanding of where Sanford was coming from in relation to her connection to the San Granit incident and she apologised for not apprising the vessel manager and Ms Campbell of the content of the MOJ check pertaining to the person involved.

[67] Some time was then spent on going through the recruitment timeline for the person involved in the San Granit incident and another engaged crew member with a dubious MOJ history and how Ms Naidu-Franz had approached her decision-making and documentation. The conversation highlighted Ms Naidu's failure to upload material into Mango in a timely fashion and share information. Ms Stewart on identifying missing information allowed Ms Naidu-Franz a break to retrieve such.

[68] A discussion on the person involved in the San Granit incident and another crew member then proceeded, which highlighted that Ms Naidu-Franz's provided timeline appeared to conceal that the MOJ check had been delayed due to her inattention to documentation detail and that key information had not been shared. After some discussion about MOJ check inadequacies, Ms Naidu-Franz conceded that apart from being under pressure she had "no excuse for it, no I can't give any explanation".

[69] Ms Stewart, after suggesting that Ms Naidu-Franz was fully aware of her expectations due to her past and present experience, then indicated:

I have lost all trust and confidence ... in you and how you failed to perform, the inherent nature of your role and responsibilities and for a recruitment partner for Sanfords. And I can't see a way forward.

[70] After a further brief exchange, where Ms Naidu-Franz acknowledged her failure to properly deal with paperwork and utilise Mango, Ms Naidu-Franz asked for more time to prove herself but Ms Stewart reiterated her lack of confidence in any changed pattern of behaviour and indicated:

I'm proposing termination of your role effective immediately. Um and I know that's hard to hear um I'm happy to adjourn for you guys to digest that um I'm happy to have a without prejudice conversation on what um an exit package sorry an exit would look like for you

[71] Ms Stewart then provided an adjournment for feedback on the dismissal proposal. Ms Naidu-Franz had asked for an hour and this was agreed.

[72] The parties resumed the meeting and Ms Stewart initially clarified the decision had not been finalised and sought feedback on the proposal to dismiss. Ms Naidu-Franz then indicated: "Not too sure what other feedback I can possibly provide", she had consulted her

counsel and he had sent through a letter. Ms Stewart indicated she had not received the identified letter but on checking her laptop discovered it had been sent and she took a break to read it.

[73] The 5 November letter from counsel was split into two parts: the first being a response to Ms Stewart's 4 November letter (that Ms Naidu-Franz had signalled was being withheld pending how the meeting transpired) and a "Post Script" addressing Ms Stewart's proposed dismissal. I observe that counsel wrongly suggested his client had "for all intents and purposes" received notice of dismissal – when what had been alluded to was a proposal seeking feedback.

[74] Counsel for Ms Naidu-Franz then suggested summary dismissal was not an option open to Sanford for reasons outlined, that included in summary:

- An unreasonable widening of the parameters of the initial investigation, to include issues beyond the San Granit incident that counsel described as the "primary allegation" and that Sanford had effectively created two separate issues in a procedurally unfair manner.
- Sanford could not reasonably establish a causative link between the San Granit incident and Ms Naidu-Franz, regardless of identified recruitment deficiencies she had been involved in. Counsel then sought to affirm Ms Naidu-Franz's recruitment judgement in assessing the MOJ record of the person involved in the incident within the limitations of not having specific written guidance.
- A suggestion that workload pressures had impacted on Ms Naidu-Franz's adherence to policies and processes that would in future be strictly adhered to.

[75] Ms Naidu-Franz's counsel concluded by suggesting that: contextual issues impacting on his client had not been fairly assessed, the extent of potential breaches had not been properly identified and then he asserted Sanford "after proper consideration," could only issue a warning for Ms Naidu-Franz's performance inadequacies. The letter concluded by indicating Ms Naidu-Franz would continue with the meeting at 2 pm of that day (5 November) but she believed that her employment had been ended "so will likely have very little to say about matters".

[76] I observe, although at this point the process was moving swiftly, Ms Naidu-Franz and presumably her counsel, appear to have not fully appreciated that Sanford were proposing dismissal and was seeking a submission from Ms Naidu-Franz on what mitigating factors they should consider beyond what had been already discussed or communicated. During the Authority investigation meeting, Ms Naidu-Franz affirmed that she believed she had an adequate opportunity to respond to concerns during the disciplinary meeting. I observe from the transcript of both meetings that Ms Naidu-Franz urged Sanford to conclude matters with haste and at no time sought an adjournment.

The final stage of the 5 November meeting

[77] Ms Stewart upon resuming and having read counsel's letter, then briefly summarised the points made by Ms Naidu-Franz's counsel and Sanford's view of such and, asked if Ms Naidu-Franz had anything else to add. Ms Naidu-Franz indicated "no".

[78] Ms Stewart then indicated: "So I guess my final decision is to terminate" and then explained as it was a summary dismissal, no notice was due but: "I guess without prejudice I'm comfortable to pay you the sum equivalent to four weeks as well within the final payment to you". Ms Naidu-Franz responded: "Okay".

[79] Ms Naidu-Franz by way of a letter from her counsel of 6 November 2020 raised a personal grievance alleging the dismissal was unjustified and sought reinstatement.

[80] In a letter from Ms Stewart of 8 November 2020, Sanford's reasons for dismissal were extensively traversed. Broadly, the dismissal was categorised as stemming from Ms Naidu-Franz's "failure to follow our internal recruitment processes and process, ... including in relation to the MOJ checks" relating to the person involved in the San Granit incident and 15 other crew members and, a failure to maintain appropriate recruitment documentation. Ms Stewart concluded:

Based on the factual information I had at hand, which was presented to you on Thursday 05 November 2020, there have been a number of allegations upheld, and as a result believe you have failed to follow lawful and reasonable instruction and I have lost full trust and confidence in your ability to carry out the role you have been employed to do as the Recruitment Partner/HR Administration Support within Sanford

[81] Whilst confirming the dismissal was summary, effective on 5 November, Sanford indicated Ms Naidu-Franz would be paid four weeks' salary and up to three EAP counselling sessions were offered.

[82] In another letter to Ms Naidu-Franz's counsel of 8 November 2020, Ms Stewart responded to the personal grievance and Sanford offered to attend mediation.

[83] The parties subsequently attended an unsuccessful mediation and a statement of problem was lodged in the Authority by Ms Naidu-Franz on 24 May 2021 alleging an unjustified dismissal and unjustified disadvantage and seeking compensatory remedies but not reinstatement.

Was the dismissal justified?

[84] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[85] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner; these summarised are:

- (a) Whether the employer properly identified the issues of concern with the employee prior to deciding to dismiss?
- (b) Whether given the resources available to the employer, did they sufficiently investigate the identified concerns?
- (c) Was the employee afforded a reasonable opportunity to respond to the identified concerns?
- (d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss?
- (e) Any other contextual factor the Authority regards as appropriate to consider.

Resources

[86] I observe that Sanford had no problem with resources and ongoing access to specialist HR and legal advice during the process. Ms Stewart indicated she accessed the latter.

Identification of concerns

[87] Having viewed the correspondence and the transcript of the 3 November meeting, I am persuaded that Sanford properly identified the concerns they later assessed as being grounds for dismissal. I have carefully assessed Ms Naidu-Franz's seemingly genuine perception or belief that the sole issue was whether she caused the incident on the San Granit but the correspondence and meeting notes do not establish this was a confined issue or that Sanford was in any way, suggesting Ms Naidu-Franz caused the actual incident. Ms Naidu-Franz was apprised of the wider and objectively serious concerns, about her approach to recruiting several crew members, lack of agreed consultation with others and the robustness of her record keeping and her alleged evident failure to learn from the Falkland Islands incident and her part in that process.

[88] I find that Sanford properly identified that Ms Naidu-Franz had allegedly failed to fulfil various known expectations placed upon her in the recruitment process and such were properly specified.

Sufficiency of investigation

[89] My view of the investigation was that after identifying the concerns, Sanford reviewed available documentation on their operation software system (Mango) and then put wider concerns to Ms Naidu-Franz on information that was not recorded. Sanford then asked Ms Naidu-Franz to provide her own perspective and to detail her own process. Ms Naidu-Franz was at work during the investigation and she raised no issues about accessing information or the timeframe imposed upon the gathering of such.

[90] No procedural or good faith issue other than the supposed widening of the investigation, was contended during the investigation meeting. I find the investigation was adequate and it identified a range of well documented concerns seeking Ms Naidu-Franz's response.

Reasonable opportunity to respond?

[91] Having accepted that Sanford properly identified concerns and put such, I have considered whether Ms Naidu-Franz had a reasonable opportunity to respond. Ms Naidu-Franz did not contest the process and apart from naturally disagreeing with Ms Stewart's assessment of the situation, accepted she had sufficient opportunity to answer the concerns raised. Objectively, viewing the process that I would describe as relatively short, I did not consider that Ms Franz-Naidu had any cause for concern and on the contrary, she attempted to pre-empt the process despite having access to legal representation. Ms Naidu-Franz did not raise any issues about the timing of the investigation meetings.

[92] Whilst not always being required, an appropriately fair approach is to conduct a 'two step' conclusion process, to first make a preliminary view known to the employee and perhaps set out the reasons for such in writing, then invite the employee to make a submission to the decision-maker on those preliminary findings. This type of more considered or scrupulous approach, was not strictly followed here by Sanford but I did not detect that Ms Stewart wanted to rush the process, rather that Ms Naidu-Franz wanted a swift resolution and given her admissions made, the complexity of further assessing an investigation finding was not at issue. I conclude Ms Naidu-Franz had a sufficient opportunity to respond to the identified concerns.

Did Sanford genuinely consider Ms Naidu-Franz's explanations?

[93] Whilst on the surface, the investigation and dismissal process were enacted in a relatively short timeframe, I heard evidence that Ms Stewart in consultation with Ms Campbell, did carefully consider Ms Naidu-Franz's perspective of the situation. The transcript and uncontested evidence showed Ms Naidu-Franz advanced very little explanation to justify her neglect of key elements of her role other than a suggestion that workload and lack of specific guidance on how to interpret MOJ conviction checks was at issue. Ms Stewart accepted the workload was high volume at times and pressured but indicated Ms Naidu-Franz had been recruited for her experience in such an environment and, they worked as a team with Ms Naidu-Franz never identifying workload issues in the past.

[94] To her credit, Ms Naidu-Franz largely accepted her deficiencies and essentially asked for more time to rectify such. By contrast, Ms Stewart says she carefully assessed this response but her trust and confidence that Ms Naidu-Franz would sustain improvements was eroded by the sheer scope of the deficiencies discovered and a feeling that Ms Naidu-Franz had concealed some of her mistakes and, failed to learn from the relatively recent Falkland Islands incident, that had significant financial consequences for Sanford. A crucial element in the decision to dismiss appeared to be, Ms Naidu-Franz failing to appreciate that decision-making on difficult recruitment assessments must be shared and information properly recorded in a format easily accessible to others.

[95] I am satisfied that Sanford genuinely assessed and took account of Ms Naidu-Franz's explanations that were objectively cause for serious concern when assessing her as an experienced and otherwise capable employee.

Other contextual factors

[96] I find that Sanford did attempt to provide Ms Naidu-Franz with support after she had expressed outside work tensions but during the disciplinary process Ms Naidu-Franz did not seek to highlight these factors as mitigating, this led, not surprisingly, to Ms Stewart concluding that the distress she had witnessed Ms Naidu-Franz being in on 20 October, was largely driven by an appreciation that any investigation following the San Granit incident would reveal her wider, extensive neglect. Further, Ms Naidu-Franz had failed to seek assistance or identify workload issues or concern about excessive working hours.

[97] Objectively looking at the issues brought to Sanford's attention during the investigation, it was apparent that significant neglect of understood process requirements was at issue.

[98] I was not persuaded by Ms Naidu-Franz's counsel's contention that insufficient guidance had been provided in writing around MOJ criminal records' interpretation, as such was well discussed after the Falkland Islands incident and Ms Naidu-Franz did not display any lack of knowledge on Sanford's ongoing requirements to consult if in difficulty including, the general expectation that she would discuss candidate 'fit for purpose' requirements with the vessel skippers.

[99] I do conclude regarding the person involved in the San Granit incident and the judgement exercised by Ms Naidu-Franz over the MOJ criminal record, that it was not objectively unreasonable from her perspective. This is because, Ms Naidu-Franz genuinely believed she was exercising good judgement and she had set out her decision-making philosophy and approach in writing after the Falkland Islands incident and I had no evidence to show that Sanford disagreed with this approach.

[100] In essence, Ms Naidu-Franz's approach was liberal in considering criminal behaviour and rehabilitative prospects and she had expressed this to her employer. I also consider that in the current tight labour market and the nature of the work that Sanford was recruiting people for, it inevitably involved background checks that may not have been considered ideal. However, it was clear that Ms Naidu-Franz knew that she should consult over marginal decisions especially after a reference check had identified a potential problem. She failed to do so on more than one occasion without adequate explanation. On a wider basis, Ms Naidu-Franz failed to properly and/or promptly record vital recruitment information in a format she knew had to be accessed by offshore management for reasons that included health and safety compliance.

Were alternatives to dismissal considered?

[101] Ms Naidu-Franz's counsel had urged Sanford prior to the dismissal and repeated such in submissions, that a performance management approach or final warning was a fairer alternative. Counsel asserted this would have involved giving Ms Naidu-Franz an opportunity to address concerns over time. I put this to Ms Stewart and it was her view that the review following the Falkland Islands incident had sufficiently alerted Ms Naidu-Franz to the need to take a more systematic and collaborative approach to recruitment decisions and, that she thought Ms Naidu-Franz had appreciated this, bearing in mind her previously demonstrated competence and skill set was not a concern. Ms Stewart described that having assessed the evidence of Ms Naidu-Franz's widespread failure to adhere to agreed processes it did not give her confidence that a performance management approach would result in a sustained restoration of trust and confidence.

[102] Ms Campbell recalled that the alternative of performance management was discussed with Ms Stewart but rejected by her with Ms Campbell recalling a significant 'turning point' away from this approach was the discovery on the last day of the disciplinary process that

Ms Naidu-Franz had not provided full disclosure of events surrounding recruitment of the person involved in the San Granit incident including not initially being accurate in recall of when the MOJ report was received. Ms Campbell did not recall Ms Naidu-Franz's personal circumstances being discussed during the final dismissal meeting.

[103] Ms Stewart described the tipping point in the decision to dismiss Ms Naidu-Franz was consideration of health and safety risks not being fully appreciated in her approach to recruitment and her failure to share MOJ information with the vessel skipper.

[104] Counsel for Sanford submitted this was negligence rather than a performance issue and that Sanford was entitled to consider it in this context as meeting the threshold of what could be considered serious misconduct.

Assessment

[105] Overall, in applying s 103A of the Act I find the issues are reasonably clear cut and Ms Naidu-Franz was afforded more than one opportunity to explain her actions and omissions and she conceded her significant failure to undertake known basic duties. No further investigation was necessary as the omissions in question had been established and were not contested at the disciplinary meeting.¹ Whilst I have not found that Ms Naidu-Franz exercised poor judgement from her expressed approach around some of the MOJ criminal record checks as she had set out the methodology she was adopting and this was uncontested by Sanford, I do find that she knew she was under an obligation to consult others and neglected this step without any reasonable explanation. It is only speculative to consider that the San Granit incident and the financial costs of such could have been avoided by a better recruitment process but it is reasonable for Sanford to expect that tough previous lessons would be learned and systemic change adhered to.

[106] In addition, Sanford identified various key record keeping deficiencies that displayed Ms Naidu-Franz's inexplicable and repeated neglect of key aspects of her role. I accept

¹ It has been suggested that when serious misconduct is admitted by an employee, it is not necessary for the employer to spend more time investigating the matter: *Murphy and Routhan t/an Enzo's Pizza v van Beek* [1998] 2 ERNZ 607 (EmpC). See also *Smith v Datamail Ltd* ERA Wellington WA125/09, 2 September 2009; *Reynolds v Mount Cook Airline Ltd* [2013] NZERA Christchurch 155 (where the Authority expressly referred to *Enzo's Pizza* and confirmed its continuing legal relevance under s 103A).

Sanford's counsel's submission that objectively the accumulated omissions reached the threshold of being capable of being considered serious misconduct.

[107] It is not appropriate that I 're-run' the employer investigation or 'step into the employer's shoes' but I have to be satisfied objectively, that Sanford acted reasonably in all the circumstances and fairly assessed the responses Ms Naidu-Franz provided – i.e., to determine whether what Sanford did was “what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred ...”.² In this context, balancing Ms Naidu-Franz's sometimes less than full explanations, the extent and scope of the neglect of adherence to recently agreed process (and guidance), including consultation failures and acceptance of such without a reasonable explanation, I find the decision to dismiss was substantively a decision open to Sanford and they enacted it in a fair and reasonable manner in all the circumstances.

[108] In coming to the above conclusion, I did carefully consider Ms Naidu-Franz's counsel's suggestion that a performance management approach was apt but I was not convinced by his suggestion, made in submissions, that no previous warning had been given to Ms Naidu-Franz that she was doing anything wrong – this was simply incorrect and contrary to the evidence advanced.

[109] In making this finding, I stress that Ms Naidu-Franz assisted my investigation and presented as an intelligent, capable person who was open and frank in responding to questions. If Ms Naidu-Franz was overwhelmed by her workload and external pressures, she sadly did not bring such to her former employer's attention at the time or properly identify such potentially mitigating matters during the disciplinary process so that Sanford could reasonably address such. I have unfortunately found that an accumulated neglect of key tasks has led to Ms Naidu-Franz's justified dismissal.

[110] I find that the summary dismissal was substantively justified on the grounds that despite her significant allied experience and evident capabilities, Ms Naidu-Franz neglected to adhere to known and vital elements of her role (broadly ignoring her employer's instructions) and this destroyed the high level of trust and confidence Sanford had previously placed in her.

² Section 103(A)(2) Employment Relations Act 2000 and summarised in *Cowan v Idea Service Ltd* [2019] NZEmpC 172.

Finding

[111] I have found that Elaine Naidu-Franz was not unjustifiably dismissed by Sanford Limited and is not entitled to any of the remedies sought.

Costs

[112] Costs are at the discretion of the Authority and are reserved. The parties are encouraged to reach agreement on costs. If no agreement is achieved, Sanford Limited has fourteen days following the date of this determination to make a written submission on costs and Elaine Naidu-Franz has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority