IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 161
5320550

	BETWEEN	AARON PICKERING Applicant
	A N D	SEALORD GROUP LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Anjela Sharma, Counsel for Applicant Justine O'Connell, Advocate for Respondent
Investigation Meeting:	6 and 7 December 2012 at Nelson
Submissions Received:	7 December 2012, 21 December 2012, 8 February 2013 & 12 March 2013 from the Applicant 7 December 2012, 18 January, and 12 March 2013 from the Respondent
Date of Determination:	12 August 2013

DETERMINATION OF THE AUTHORITY

A. **Aaron Pickering was an employee and has a personal grievance that he was unjustifiably dismissed.**

B. **Sealord Group Limited is to pay Aaron Pickering $71,973.86 lost remuneration under s.128 of the Employment Relations Act 2000.**

C. **Sealord Group Limited is to pay Aaron Pickering $8,000 compensation under s.123(c)(i) of the Act.**

D. **Sealord Group Limited is to pay Aaron Pickering 5% interest on $71,973.86 calculated from 1 April 2012 until the date of payment.**

Employment relationship problem

[1] Aaron Pickering is a fisherman based in the Nelson area. Between 2005 and January 2007, Mr Pickering was employed as a deckhand for Sealord Group Limited (Sealord) on some casual and 'temporary' contracts.

[2] On 19 January 2007, Mr Pickering and Sealord entered into an employment agreement which was expressed to be for a *temporary position for one trip and will commence on 14 January 2007* as the bosun on the 'FV Will Watch' fishing out of Port Louis, Mauritius.

[3] It was agreed that Mr Pickering would be paid $418 gross per seagoing and travelling day. He was paid holiday pay of 6% of his gross taxable earnings at the end of the trip.

[4] It is not in dispute that about 26 May 2007 Mr Pickering was taken on as the bosun on the Will Watch on an on-going basis. Before his second trip as bosun he started being paid at $185 per day plus a bonus at the end of each trip which was calculated on the basis of a 1.18%[1] share of the catch.

[5] Mr Pickering continued as the bosun on one of the swing shifts on the Will Watch. He was paid fortnightly for his seagoing trips and then paid a share of the catch once that had been calculated at the end of each trip. He was also paid fortnightly on his trips off while back in New Zealand. His transport between New Zealand and Mauritius was arranged and paid by Sealord.

[6] Both parties agree that Mr Pickering was an employee of Sealord for the duration of the 2007 'temporary' contract and before he was paid a lower daily rate and a share of the catch. They disagree about his status after the first trip.

[7] Paul Taylor worked for Sealord and was the ship's husband, or vessel manager, for the Will Watch. He represented the ship's owners once it was in port and attended to *its provisioning, repairing and general management*[2]. Mr Taylor went to Port Louis in Mauritius for the changeover of the crew shifts and to manage maintenance etc. of the vessel.

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1 Initially 1.10%

2 The on-line Merriam-Webster dictionary.

[8] Mr Taylor was responsible for entering into contracts with crew members of the Will Watch, as independent contractors or as employees, and negotiating rates of pay and/or percentage catch shares to be paid.

[9] Mr Pickering's and Mr Taylor's accounts vary about what happened in September 2010. At that point, Mr Pickering expected that he was going to fly out again in early October to Port Louis to undertake another swing shift. However, on 17 September 2010, during Mr Pickering's trip off, Mr Taylor telephoned him at home and Mr Taylor told him that he was no longer required as bosun on the Will Watch. There were some other discussions between Mr Taylor and Mr Pickering, the result of which is that Mr Pickering has not worked on the Will Watch or for Sealord since.

The claims

[10] Mr Pickering claims that his employment with Sealord continued pursuant to the employment contract entered into on 19 January 2007, with the only change being the basis on which he was paid.

[11] Mr Pickering claims that he was unjustifiably dismissed by Sealord and claims lost remuneration of $167,801.04, and compensation of $20,000 for loss of dignity and injury to his feelings. Mr Pickering claims interest should be paid on his lost remuneration. He also claims legal costs.

[12] Sealord resists Mr Pickering's claims. It says that it provides payroll and other services to another company in the same group called United Fame Investments Limited (United Fame) which operates the Will Watch. Sealord says that it employs engineers and cooks who work on the vessel. However, Sealord says that all other personnel on the Will Watch are engaged by United Fame as independent contractors who are paid pursuant to a share fishers' agreement.

[13] Sealord says that Mr Pickering was independently contracting his services to United Fame from the time that his temporary employment agreement ceased in late May 2007 and he became rewarded for his work on the basis of a share of the catch.

[14] Sealord says that because Mr Pickering was an independent contractor, it was able to end his engagement with United Fame in the way that it did in September 2010. Sealord says that the Authority has no jurisdiction to consider Mr Pickering's

claims because he was an independent contractor, not an employee in September 2010.

[15] However, if Sealord is found to have been Mr Pickering's employer it says he was dismissed for cause and contributed to his dismissal.

[16] United Fame is not a party to these proceedings. If I decide that Mr Pickering was engaged by United Fame and not by Sealord I do not have jurisdiction to consider his claim of unjustified dismissal.

Issues

[17] The issues the Authority needs to determine are:

(a) Whether Mr Pickering was an employee of Sealord or of United Fame or was an independent contractor; or

(b) Whether Mr Pickering was jointly employed by United Fame and Sealord; and

(c) If Mr Pickering was an employee of Sealord whether he was unjustifiably dismissed; and

(d) If Mr Pickering was unjustifiably dismissed what remedies he should be awarded.

Was Mr Pickering an employee of Sealord or engaged as an independent contractor?

[18] Section 6 of the Employment Relations Act 2000 defines an 'employee'. The relevant parts of s.6 are:

> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be)* ***must determine the real nature of the relationship*** *between them.*
>
> *(3) For the purposes of subsection (2), the court or the Authority—*
>
> *(a)* ***must consider all relevant matters****, including any matters that indicate the intention of the persons; and*

> *(b)* ***is not to treat as a determining matter any statement by the persons that describes the nature of their relationship***. [my emphasis]

[19] I need to determine the real nature of the relationship between the parties. The tests for doing so are well established. In *Bryson v. Three Foot Six Limited*[3] the Supreme Court said *all relevant matters* include:

- *The written and oral terms of the contract, including terms indicating the parties' intentions,*
- *Any divergences from those terms in practice,*
- *The day-to-day implementation of the contract, and*
- *The tests of control and integration, and whether the contracted person is effectively working on his or her own account (the fundamental test).*

[20] Industry practice can also be relevant, although it is not determinative[4]. The ultimate decision about whether someone is an employee *depends upon the entire factual matrix*[5].

The contractual arrangements

[21] The starting point for examining the real nature of the relationship between the parties is the contractual arrangement.

[22] Prior to the first trip Mr Pickering met with the Will Watch skipper, Charlie Shuttleworth, because Sealord was looking for a new bosun for Mr Shuttleworth's shift. Mr Pickering was verbally offered the first trip which he accepted. The written contract was presented to him by Mr Taylor and signed once Mr Pickering got to Port Louis to begin the trip.

[23] It was understood between Mr Pickering, Mr Shuttleworth and Mr Taylor that Mr Pickering would go on that first trip to see whether he performed well enough to become bosun on an on-going basis on Mr Shuttleworth's 'swing'.

[24] Mr Pickering says that during that first trip Mr Shuttleworth confirmed that he would be taken on as bosun. Sealord says, and I accept, that it was not Mr Shuttleworth's decision to engage Mr Pickering. However, it is clear that Sealord acted on Mr Shuttleworth's approval of Mr Pickering to engage him on an on-going

[3] [2005] ERNZ 372
[4] [2003] 1 ERNZ 581 at paragraph [19]. Judge Shaw's Employment Court decision was reinstated by the Supreme Court.
[5] Ibid at paragraph [21]

basis as bosun. Mr Shuttleworth was acting as Sealord's agent when he conveyed the news to Mr Pickering.

[25] Sealord says that after the first trip Mr Pickering became engaged under a share fishers contract or arrangement with United Fame as an independent contractor. However, no written agreement exists between Mr Pickering and United Fame and Mr Pickering has had no direct dealings with United Fame in relation to his work or payment.

[26] It was Mr Taylor's usual practice to enter into a new written agreement with crew engaged on an on-going basis and he says that he always intended that once Mr Pickering was receiving a share of the catch he would be an independent contractor contracted to United Fame.

[27] Mr Pickering says that he never wanted to be an independent contractor again and that he was only interested in being an employee. He had previously had a large GST debt with the IRD and did not want to be bothered with the intricacies of being self-employed again.

[28] Mr Pickering initially claimed he had signed an employment agreement with Sealord after his first trip but has subsequently accepted that he did not. Therefore, the only written agreement is the one expressed to be for temporary employment with Sealord beginning on 14 January 2007.

[29] There was no 'common intention' between the parties rendered into writing after the January 2007 employment agreement was entered into. There is no mention of United Fame in the employment agreement.

What is the effect of s.66 of the Employment Relations Act 2000 on the "temporary employment" agreement?

[30] Employment law recognises a number of different types of employment arrangements including casual employment, fixed-term employment, trial periods and probationary periods of employment but not, as a term of art, 'temporary employment'.

[31] The January 2007 agreement was intended by both parties to be for the duration of one trip. I consider that the parties more likely than not intended the agreement to be for a fixed-term.

[32] The agreed purpose of the employment agreement was to trial Mr Pickering as bosun.

[33] Section 66 of the Employment Relations Act 2000 specifies the requirements for a valid fixed-term employment agreement:

> *(1) An employee and an employer may agree that the employment of the employee will end—*
> *(a) at the close of a specified date or period; or*
> *(b) on the occurrence of a specified event; or*
> *(c) at the conclusion of a specified project.*
>
> *(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—*
> *(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
> *(b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
>
> *(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):*
> *(a) to exclude or limit the rights of the employee under this Act:*
> *(b) to establish the suitability of the employee for permanent employment ...*
>
> *(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—*
> *(a) the way in which the employment will end; and*
> *(b) the reasons for ending the employment in that way.*
>
> *(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.*
>
> *(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—*
> *(a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
> *(b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.*

[34] The employment agreement between Mr Pickering and Sealord did not comply with s.66 in the following ways:

- It was for the purpose of assessing Mr Pickering's suitability for permanent employment in contravention of s.66(3)(b);
- It did not advise Mr Pickering when or how his employment would end in contravention of s.66(2)(b);

- In contravention of s.66(4)(a) and (b) it did not advise Mr Pickering in writing the way the employment would end or the reason for ending the employment that way.

[35] Non-compliance with s.66(4) of the Act does not affect the validity of an employment agreement between Sealord and Mr Pickering. However, pursuant to s.66(6) non-compliance with s.66 means that Sealord cannot rely on the fact the agreement said it was limited to one trip to end the period of employment if Mr Pickering elects to treat the term as ineffective.

[36] In the Employment Court case of *Schneller v Ranworth Healthcare Ltd*[6] Chief Judge Colgan said:

> *If employment was pursuant to a lawful fixed term agreement, the expiry of this agreement according to its terms would not support a claim to an unjustified dismissal. If, however, what purported to be a fixed term employment agreement did not meet the statutory requisites, the employee's employment was to be regarded as of indefinite duration and its termination a dismissal amenable to consideration as a personal grievance alleging that it was unjustified.*

[37] By failing to put in writing the reasons for the employment ending at the end of the trip beginning in January 2007 Sealord was not permitted to rely on the expiry of that trip to end Mr Pickering's employment.

[38] Although it is a long time after the purported end of the fixed term agreement it is arguable that in making his claim of unjustified dismissal Mr Pickering has elected to treat the term of the fixed-term agreement as ineffective to end his employment.

[39] The existence of the written employment agreement between Mr Pickering and Sealord and Mr Taylor's continued involvement as vessel manager point towards Mr Pickering being in an on-going employer/employee relationship with Sealord after the end of the first trip.

The classic tests for determining employment relationships

[40] **The control test** requires me to consider to what extent Sealord exerted control over Mr Pickering's work. A fisher on a ship is necessarily under the control of the captain and any other senior member of the crew. Shipboard work is a unique

[6] (2007) 4 NZELR 463, at paragraph [19]

environment and requires a chain of command as much for safety reasons as for any other. That necessity is even greater when a crew spends up to three months at sea together as Mr Pickering and his crew mates did. Mr Pickering was in the control of Sealord through the command chain 24 hours a day when at sea.

[41] Also when in Port Louis Mr Pickering was subject to control both by the skipper and by Mr Taylor. I conclude this from the evidence of Chris Howarth, who became skipper of the Will Watch on Mr Pickering's shift after Mr Shuttleworth, and the evidence of Mr Taylor and Mr Pickering.

[42] However, Mr Pickering's actual work on deck with the fishing gear was not closely supervised at all times because as bosun he had a certain amount of decision making power vested in him in relation to operating the equipment. He worked in conjunction with all the crew to maximise the catch but also sometimes made decisions alone about how to manage the fishing gear to achieve that.

[43] Sealord was not in control of what Mr Pickering did on his trips off back on land in New Zealand. Mr Pickering would have been free to take on other work on his trips off. He only had to make himself available to travel to Port Louis on the date decided by Sealord.

[44] The fact of almost total control on trips on is negated to a great extent by lack of control on trips off. In relation to the control test the role of bosun would have been able to have been undertaken by a contractor as easily as an employee.

[45] **The integration test** requires a consideration of the extent to which Mr Pickering was an integral part of Sealord's business. Mr Pickering was integrated into the crew of the Will Watch at all times on his swing shift. However, other than being available to travel to Port Louis when required Mr Pickering was not integrated into Sealord's business when on trips off.

[46] The fact that the tools Mr Pickering required to do his work as bosun were an integral part of the Will Watch gear and were not provided by Mr Pickering is a neutral factor because the work done by Mr Pickering could have been done by a contractor in this industry.

[47] **The fundamental or economic reality test** requires me to assess the extent to which Mr Pickering was engaged in business on his own account. There are more factors favouring a conclusion that he was not. They are:

- Sealord withheld and paid PAYE to the IRD on his behalf rather than resident withholding tax[7];
- Sealord paid his ACC levies;
- Mr Pickering cancelled his GST registration and on 30 July 2007 received confirmation from the IRD that it had been cancelled. Had he understood himself to have been an independent contractor he would have been required to account for GST because he earned over $60,000 per year, the threshold for GST registration for the self-employed.
- Mr Pickering was not required to submit invoices for his pay;
- Sealord paid for Mr Pickering's air travel between New Zealand and Mauritius.

[48] Mr Pickering was not paid holiday pay after his first trip in 2007. Sealord says that indicates that he did not consider himself an employee. Mr Pickering says he did not think it unusual that he was not paid holiday pay because he was paid for his trips off. Mr Pickering says that he considered his trips off to be his paid holidays. I consider that the fact that Sealord did not make payments that were specified to be holiday pay does not weigh against an employee/employer relationship[8].

[49] The fact that Mr Pickering stood to make more money if the share of the catch and therefore the profit was increased could be a factor favouring an independent contractor arrangement. However, industry practice, as set out below, suggests that share of the catch arrangements are also a feature of some employed fishers' payment arrangements. Therefore, it is a neutral factor.

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[7] Sealord's evidence was that PAYE was the only way it's payroll system could record these payments which it also pays to IRD on behalf of its independent contractor fishers. However, in Mr Pickering's case there is no evidence these were treated as withholding tax or schedular tax payments by the IRD. The IRD treated the tax paid by Sealord for Mr Pickering's earnings as PAYE.

[8] The issue of holiday pay can be analysed in the same way the full bench of the Employment Court assessed whether fishermen were paid in compliance with minimum wage legislation in *Sealord Group Ltd v New Zealand Fishing Industry Guild Inc.* [2005] ERNZ 535.

What is the significance of industry practice?

[50] In the case of *Muollo v Rotaru*[9] Chief Judge Goddard of the Employment Court considered whether a fisherman was an employee when there was no written contract. He looked at:

> *…custom and usage in the commercial fishing industry. It is true that it is relied on too often when all that is available is evidence of a practice, even a long-standing practice, adopted by an employer for convenience without seeking any other person's assent to it. The evidence in this case shows something entirely different. It presents a picture of an industry in which the co-operative venture is not only prevalent and a typical mode of contracting business but a commercial norm. All parties under such arrangements share in the proceeds.*

[51] Chief Judge Goddard took into account the applicant's evidence that more than 50% of fishermen were employed on a contract of service. Chief Judge Goddard heard evidence from a chartered accountant, Mr Tanner, who did accountancy work for many fishermen in the Chatham Islands and metropolitan New Zealand. He was also a director of companies involved in the fishing industry:

> *The method employed in obtaining labour on fishing vessels is by utilising the share system. … In Mr Tanner's experience withholding tax is paid at source and generally at a rate of 20%. … Mr Tanner said that he is not aware of any arrangement whereby a member of a vessel's crew is on a wage or a salary. He said that in his understanding the norm was a share-fishing arrangement. He added that the fishermen pay their own ACC levies as they are self-employed.*[10]

[52] Chief Judge Goddard also applied the three classic tests and decided that Mr Muollo had been engaged as an independent contractor[11].

[53] In *Sealord Group Limited v New Zealand Fishing Industry Guild Incorporated*[12] a full bench of the Employment Court considered the question of whether crew of Sealord's fishing vessels were paid in a way consistent with minimum wage legislation. There was no dispute that the crew was employed on a continuous basis. Like Mr Pickering, the crew was paid for trips on and trips off. Also like Mr Pickering, the crew received a fortnightly retainer, or pay, with the balance owed to them being paid at the end of each trip based on a share of the catch.

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9 [1995] 2 ERNZ 414
10 Ibid, page 426
11 Ibid, page 430
12 [2005] ERNZ 535

[54] The Court was provided with an agreed statement of facts:

> *The essential facts are –*
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> - *Historically, the crew of fishing vessels in New Zealand have been paid on a "share of catch" basis. At the end of every voyage, each member of the crew received a percentage of the value of the fish caught less certain expenses. In most cases, the crew were engaged as independent contractors who were not entitled to paid holidays and did not receive any income when they were not at sea.*
> - *From the mid 1980s, New Zealand companies such as the applicants began to engage crew members as employees rather than independent contractors. This coincided with the introduction of larger vessels, including "freezer" ships which remain at sea for extended periods, typically 7 weeks.*
> - *By agreement, payment of employees remained on a "share of catch" basis. It was also agreed that the income of crew as employees should be spread more evenly throughout the period of employment. This was to enable employees to more easily budget for regular expenditure such as mortgage payments and hire purchase.*
> - *The current system of payment has several distinctive features. Crew are employed on a continuous basis but they are required to work only on alternate voyages, or two voyages out of three. They are paid in respect of every voyage, whether they go to sea and work or remain on land and are not required to work. The total amount paid to each crew member is ultimately determined by the value of the fish caught on the vessel's voyages. Each employee receives a fortnightly payment, the amount of which is determined by agreement. The balance in respect of each voyage is paid after the vessel returns to port and the value of the catch is determined.*
> - *The amount of fortnightly payments is in some cases less than the minimum wage payable with the hours typically worked during a two-week period while at sea. This is particularly the case with the less experienced sailors.*
> - *Over a series of voyages, the total remuneration received by employees exceeds the minimum wage for the hours worked.*[13]

[55] It is clear that industry practice has changed since *Muollo v Rotaru* was decided. In addition, Mr Pickering's situation is factually different from Mr Muollo's situation because Mr Pickering has a written employment agreement.

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13 Ibid pp 537-538

[56] Mr Pickering says that about 90% of fishers around the world are engaged as independent contractors on a share catch basis. He thought that perhaps Sealord was unique in employing some fishers.

[57] Sealord says that industry practice in New Zealand is for only domestic fishers, which I take to mean people who fish on ships with a New Zealand port as 'home base', to be engaged as employees and they are engaged by Sealord Group Limited itself. Sealord says that industry practice is for New Zealand based fishers engaged in fishing on ships in international waters operating out of foreign ports to be engaged as independent contractors on a share catch payment system only.

[58] However, the evidence at the investigation meeting was that the crew on the Will Watch were engaged in a number of different ways. The skippers, Mr Shuttleworth and his successor, Mr Howarth, were independent contractors engaged by United Fame and working under Sealord's direction as agent for United Fame.

[59] The cooks were employees of Sealord and were not entitled to a share of the catch. Initially I was told that the engineers were employed in the same way. However, other evidence shows that at least one of the engineers was paid fortnightly but was also paid a share of the catch and was definitely an employee.

[60] Also at least three of the fishers[14] on Will Watch who had previously been employed by Sealord in its domestic operations were employees and entitled to a share of the catch as well as to a daily pay rate when working on the Will Watch.

[61] Mr Pickering had a history of prior employment with Sealord too, although not as a permanent employee. He was employed as a deckhand on four different 'casual' employment agreements, for four separate trips during 2006. He was paid per seagoing day, not paid for trips off and paid holiday pay at the end of the agreement.

[62] His first employment with Sealord was in 2005 (a fixed-term employment agreement) as a *Project Gold Fisher*. Mr Pickering was paid per seagoing day, not paid for trips off and paid holiday pay at the end of the agreement. Page 6 of the standard Sealord employment agreement form used includes a reference to Sealord being entitled to *make a rateable deduction from my retainer/catch bonus* if

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[14] Steve Mumm, Ed Curry and Paul Smith

Mr Pickering failed to complete a rostered voyage for any reason. That shows that Sealord's standard employment agreement at the time contemplated that an employee may be entitled to a catch bonus.

Were United Fame and Sealord joint employers?

[63] I also need to consider the possibility that Sealord and United Fame were joint employers of Mr Pickering.

[64] The full Employment Court has recognised that it is possible to have joint employers[15]. In *Hutton and others v Provenco Cadmus Ltd (in receivership) and Provenco Payments Ltd*[16] the Court confirmed that common control is usually a feature of joint employers. The test is who an independent but knowledgeable observer would say was the plaintiff's employer.[17]

[65] In answering that question I need to take into account all relevant factors including the contractual arrangements already considered above.

[66] In the *Provenco* case Judge Inglis acknowledged that:

> *It is open to those controlling a business to select which company should be the employer provided that the selection is consistent with the financial and administrative organisation of the business and is not otherwise a sham.*

[67] Mr Taylor's evidence was that at the time Sealord first sought to fish in international waters for orange roughy the industry was very competitive and it was important to protect *your fishing areas or 'hills'* from other operators who were less concerned with fish stock sustainability. Therefore, Sealord sought to distance the Will Watch from Sealord, which was known internationally as being a leading orange roughy expert.

[68] To that end, Sealord sold Will Watch to a Hong Kong company, United Fame Investments Limited. United Fame was also a part of Kura Group, the company that wholly owns Sealord. The vessel's name was changed from Will Watch and it was registered (flagged) in Panama:

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15 *McDonald v Ontrack Infrastructure Limited* [2010] ERNZ 223. The Court also decided that s.6 of the Act is the test that applies to deciding whether there were joint employers.

16 [2012] NZEmpC 207 at paragraph 79.

17 Ibid.

> *Sealord still supplied the New Zealand based officers of the vessel with the rest of the crew being sourced from the Philippines.*

[69] In 2001 the vessel was sold by United Fame to United Fame Investments (Cook Islands) Limited and flagged in the Cook Islands. The name was changed back to Will Watch. Will Watch remains flagged in the Cook Islands.

[70] All shares in United Fame Investments (Cook Islands) Limited were transferred to Sealord in 2009.

[71] Sealord says that United Fame Investments (Cook Islands) Limited charges United Fame a charter fee for use of the vessel for United Fame's fishing operation. Sealord says that United Fame's annual accounts filed in Hong Kong include the costs Sealord pays for the Will Watch's fishers, engineers and cooks. However, Kura Limited, which owns both United Fame and Sealord, reports all profits and losses for the Will Watch operation.

[72] Kura Limited's 2010 Annual Report says:

> *The principal activities of the Group are the catching, processing and marketing of seafood.*

[73] United Fame's directors' report for the year ended 30 June 2008 says:

> *The Company's principal activities consisted of carrying out exploratory fishing operations and the provision of ship management services to its subsidiary.*

[74] Sealord is not United Fame's subsidiary. Sealord acts as United Fame's agent for the Will Watch in relation to the vessel management and paying crew, whether as employees or independent contractors[18].

Mr Pickering's awareness of United Fame

[75] It is agreed that the documentation on board the *Will Watch* is headed United Fame and the boxes in which the product is packed are also branded United Fame, or 'UF' with a picture of a fish on them[19]. Sealord says from the documents and the boxes Mr Pickering should have known that he was not engaged or employed by Sealord but by United Fame.

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[18] I have not seen any contractual documents between Sealord and United Fame.

[19] I did not see any of the documentation, any of the boxes or any photographs of the boxes.

[76] However, any branding on boxes or headings on ship documentation cannot be seen as evidence of a contract, whether for service or of services, between Mr Pickering and United Fame.

[77] Sealord says that in conversations with other crew members over the period of his engagement on the Will Watch, Mr Pickering must have known that the fishers were independent contractors and that he was also an independent contractor because he was paid in the same way as the rest of the crew.

[78] I accept Mr Pickering's evidence that while at sea the crew discussed the basis on which they were paid but that the discussion was mainly by way of estimating what the catch would be worth and what they would be paid for their share of the catch. I do not accept that is sufficient to decide that Mr Pickering knew that he was jointly engaged by United Fame and Sealord and was an independent contractor.

[79] There is no suggestion that Sealord's involvement in employee/contractor matters and vessel management on behalf of United Fame is a sham to avoid any responsibility to any of the Will Watch crew it engages.

[80] The reason that United Fame became the owner of the Will Watch was to obscure its connection with Sealord to protect its ability to fish successfully and sustainably and is not connected in any way to Mr Pickering's work as bosun on the Will Watch.

[81] There is no evidence that United Fame exercised any control or direction over Mr Pickering. He had no dealings at all with United Fame.

[82] In the *Provenco* case Judge Inglis referred to *Golden Plains Fodder Australian Pty Ltd v Millard*,[20] a decision of the Supreme Court of South Australia, which held:

> *The payment of wages by a particular entity is not conclusive evidence of an employment relationship* [21]*. …*
>
> *Payment of wages and issuing a taxation group certificate by one entity is important but not conclusive as to the identity of the employer. It may reflect no more than financial convenience between entities within one corporate group*

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20 (2007) 99 SASR 461 (SC)

21 Ibid, at p 474

[83] Judge Inglis decided that the entity undertaking the payroll functions was not a joint employer.

[84] However, Mr Pickering's circumstances are different from those in the *Provenco* case. The *same* entity with which Mr Pickering entered into an employment agreement, Sealord, was the entity which administered his pay, and paid his PAYE and ACC levies.

[85] There is no need to imply a contract with United Fame and I do not do so.

[86] The only written contract Mr Pickering entered into was with Sealord. He has no contractual relationship with United Fame. United Fame did not exert joint control with Sealord over Mr Pickering.

[87] Whatever agency arrangement Sealord had with United Fame it was not drawn to Mr Pickering's attention in the employment agreement, explicitly or impliedly. United Fame had no direct involvement in Mr Pickering's employment in any way that was known to him. Mr Pickering is not a sophisticated business man, although some of his former shipmates may be. However, the Kura Limited intra-group arrangements in relation to the Will Watch's operation are complex and there is no reason to conclude that Mr Pickering, or indeed any of his ship mates, understood exactly the inter-relationships between Sealord and United Fame, and United Fame Investments (Cook Islands) Limited.

[88] It is useful to consider the doctrine of the undisclosed principal. In employment law the doctrine applies when an ostensible employer (for example, Sealord) asserts that it has been acting as an agent for another entity (for example, United Fame) which it says is the true employer. However, the ostensible employer has not disclosed the fact of its agency to the employee earlier.[22]

[89] The law provides that both the agent and the principal may be jointly and severally liable. There is no evidence that Sealord told Mr Pickering during his employment or at the time of his dismissal that it was an agent for United Fame and that United Fame was his employer. Sealord did not discharge its duty to make the identity of United Fame as his employer known to Mr Pickering. Therefore Sealord

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22 See, for example, *Cuttance v Purkis* [1994] 2 ERNZ 321

cannot avoid its obligations as Mr Pickering's employer on the basis of its role as United Fame's agent in these circumstances.

[90] After carefully weighing all the relevant factors I find the balance of the evidence weighs in favour of an employer/employee relationship. That is the *real nature* of the arrangement between Mr Pickering and Sealord was that Mr Pickering was an employee of Sealord alone, and not jointly with United Fame.

Was Mr Pickering unjustifiably dismissed?

[91] Mr Pickering was dismissed by Sealord in September 2010. I need to consider whether he was unjustifiably dismissed.

[92] An amendment to section 103A of the Employment Relations Act 2000 (the Act) came into force on 1 April 2011. Mr Pickering was dismissed during 2010. His dismissal pre-dated the commencement of the 2011 amendments. It is well established that legislation is presumed not to have retrospective effect. The test for justification under s.103A that applied at the time of his dismissal is the test I need to apply.

[93] At the time of the dismissal section 103A read:

> *… the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer* ***would*** *have done in all the circumstances at the time the dismissal or action occurred.*

[94] According to Judge Shaw of the Employment Court I need to view the matter from the point of view of a neutral observer and ask whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances viewed objectively.[23]

[95] Mr Howarth had concerns about what he said was a reduction in Mr Pickering's performance and about aspects of Mr Pickering's attitude to work and to him as the new skipper. Mr Howarth raised those concerns with Mr Taylor, and a number of other members of the crew as well as another skipper.

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23 *Air New Zealand v Hudson* [2006] ERNZ 415, at paragraph 113.

[96] Mr Howarth and Sealord also consider that Mr Pickering had passed on information about a valuable *hill* to Mr Shuttleworth and had generally discussed *where we had been fishing*. By that time Mr Shuttleworth was working for a competitor of Sealord.

[97] In May 2010, before Mr Pickering's second trip with Mr Howarth as skipper, Mr Howarth says that Mr Pickering attended a meeting on board Will Watch with Mr Howarth, Mr Taylor and Phil Gaugler, the skipper on the Will Watch's opposite swing. There is some dispute about when this meeting took place however, the timing is not material except that it was prior to Mr Pickering being dismissed in September 2010.

[98] Mr Taylor says:

> *At the meeting we discussed Aaron's problems with Chris* [Howarth] *and his attitude. We also discussed issues with Aaron's work as he had been slacking off and leaving work up to other crew.*
>
> *We also confronted Aaron about passing on information to Charlie* [Shuttleworth] *but he denied this. Aaron said that the fact Charlie had called Chris from his cellphone*[24] *meant nothing and that Charlie must have got the information from somewhere else.*
>
> *We made it very clear to Aaron that we were not happy with his performance and were suspicious that he did tell Charlie where we caught fish even if he had done this when in an intoxicated state.*
>
> *…Aaron acknowledged he had been slacking off a bit and would pull his socks up, he denied passing on confidential information and told me it was another ex crew member who had done this. I subsequently confronted this crew member who was then working on another ship but he denied this and from my knowledge of him I was more inclined to believe him than Aaron.*

[99] Mr Pickering denies having implicated an ex-crew member. Indeed, he denies the meeting took place at that stage and says the only meeting was in advance of Mr Howarth's first trip as skipper in December 2009.

[100] Mr Pickering says Mr Howarth warned him not to tell Mr Shuttleworth about fishing spots. He also denies that he admitted to having been *slacking off* and says he always worked hard including when Mr Howarth became skipper.

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[24] Mr Howarth's evidence was the call was from Mr Pickering's home landline.

[101] He strongly denies ever having told Mr Shuttleworth about the Will Watch's fishing spots and also denies anyone ever having raised problems with his work, his work ethic or his attitude with him prior to being dismissed.

[102] Mr Howarth attempted to limit Mr Pickering's on shore socialising with Mr Shuttleworth in Port Louis to prevent Mr Pickering passing on information to Mr Shuttleworth.

[103] Even if I accept Mr Taylor and Mr Howarth's evidence of the on-board meeting with Mr Pickering I have a number of concerns about the lack of fair process prior to Mr Pickering's dismissal.

[104] For example, Mr Taylor did not report back to Mr Pickering about his questioning of the former crew member he says Mr Pickering suspected of passing information to Mr Shuttleworth. In fact, no formal disciplinary process in relation to the allegation of Mr Pickering passing on information was started.

[105] The Will Watch sailed on 11 May 2010 on what became Mr Pickering's last trip. There was no performance review process put in place to deal with Mr Pickering's work performance on that trip or on any of the previous trips. In addition, no disciplinary process in relation to Mr Pickering's alleged poor performance was started.

[106] When Mr Taylor rang Mr Pickering in September 2010 to tell him he was no longer required to work on the Will Watch he did not give Mr Pickering any reasons for terminating his employment.

[107] In terminating Mr Pickering's employment Sealord did not act in accordance with common law requirements of procedural fairness:

> *The minimum requirements can be said to be:*
>
> *(1) notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
> *(2) an opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
> *(3) an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*
> *Failure to observe any one of these requirements will generally render the disciplinary action unjustified. … What is looked at is substantial*

> *fairness and substantial reasonableness according to the standards of a fair-minded but not overindulgent person.*[25]

[108] No concerns were formally raised with Mr Pickering during or after the May 2010 trip, so he was not given any notice of them. He was not given a real opportunity to respond to Sealord's concerns or explain his conduct before dismissal. Mr Taylor could not have given unbiased consideration to his explanation because Mr Pickering was not afforded the opportunity to give an explanation before the decision to dismiss him was made.

[109] I accept that Mr Taylor acted to summarily dismiss Mr Pickering the way he did because he genuinely believed that Mr Pickering was independently contracted to United Fame. He understood he could terminate Mr Pickering's contract without regard to the procedural fairness required in an employer/employee relationship. Mr Taylor relied on legal advice he had obtained before letting Mr Shuttleworth know that his contract was at an end, and applied that to dismissing Mr Pickering.

[110] Overall I do not consider that Mr Pickering was treated fairly by Sealord. Therefore, I consider that the decision to dismiss Mr Pickering was not one that a fair and reasonable employer would have made in all the circumstances the decision to dismiss was made. That is sufficient for me to conclude that Mr Pickering has a personal grievance that he was unjustifiably dismissed from his employment with Sealord and is entitled to remedies.

[111] However, I will also consider whether or not the allegations against Mr Pickering were ones, if proved, that could lead to summary dismissal. In doing so the focus must be on not what evidence was given in the course of these proceedings but on what the employer knew at the time the decision to dismiss was made.

Allegation of passing on fishing spot information to Mr Shuttleworth

[112] If this allegation was sufficiently investigated and there was sufficient evidence to reasonably decide that Mr Pickering had passed on such information it may have been a breach of his duty of fidelity to his employer. It could also have been in breach of the confidentiality clause in the 2007 employment agreement.

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[25] *New Zealand (with exceptions) Food Processing Industrial Union of Workers v Unilever New Zealand Limited* (1990) ERNZ SelCas 582, at 594-595.

[113] Mr Howarth told Mr Taylor about what he alleged Mr Shuttleworth had told him over the telephone. Mr Howarth does not say that Mr Shuttleworth told him that Mr Pickering had passed on the information about *'certain hills' at 90 East*. He assumed that information had come from Mr Pickering. However, Mr Pickering denied passing on information. Mr Taylor says he checked with a former Will Watch crew member, Rex, who he says Mr Pickering had implicated who also denied passing on information[26]. He decided that he trusted Rex more than he trusted Mr Pickering. That is as far as any investigation went before it was decided to dismiss Mr Pickering.

[114] Mr Howarth says that he was devastated to learn that *one of four crew who knew* the fishing spot location *was probably leaking information to our opposition*. However, the other crew members who Mr Howarth says knew the information were not investigated in relation to the allegation that someone had been leaking information to Mr Shuttleworth. Instead, Mr Howarth and Mr Taylor believed that it had been Mr Pickering, despite his denials, and stuck with that view.

[115] It is counter-intuitive that a fisher such as Mr Pickering paid at least in part by a share of the catch bonus would divulge the most profitable fishing spots to a competitor, even if his friend worked for that competitor and he may wish to crew for his friend in the future. The more fish caught at one of the Will Watch's *hills* by a competitor potentially the lower the Will Watch's catch and so the lower Mr Pickering's payment based on a share of the catch would be. It was pure speculation that Mr Pickering intended to leave to work on the Southern Champion with Mr Shuttleworth and that was not put to him at any time before he was dismissed.

[116] I accept that Mr Pickering and Mr Shuttleworth, whose contract on the Will Watch was terminated against his wishes, have no loyalty towards Sealord. However, I found them both to have been genuine and credible witnesses.

[117] The problem for Sealord is that it did not carry out any investigation of the kind that would be required into the serious allegation it made against Mr Pickering and because of that it was not in the position where a fair and reasonable employer would have made a decision to dismiss Mr Pickering.

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[26] Mr Pickering denies implicating anyone else.

Allegations of lowered performance and bad attitude

[118] These allegations were not investigated beyond Mr Taylor hearing from Mr Howarth and Mr Taylor forming his own view partly based on his own observations. Very few specifics of Mr Pickering's poor performance, such as times and dates, were included in Mr Howarth's or Mr Taylor's evidence in the investigation meeting. Mr Pickering vehemently denies the allegations. They were never raised with him. If he had been given an opportunity to give an explanation to Sealord Mr Pickering may have been able to call evidence from other crew mates, including the Filipino crew, to the contrary.

[119] Overall, it is not possible to say that a fair and reasonable employer would have concluded that Mr Pickering's level of work performance had reduced. In addition, summary dismissal is generally not justified for poor performance. Instead, if Sealord had real performance concerns it should have set up a process of performance management to give Mr Pickering an opportunity to improve his performance.[27]

[120] Mr Pickering has a personal grievance of unjustified dismissal and is entitled to remedies.

Remedies

Lost wages

[121] Section 128(2) of the Act provides:

> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance,*

[27] As suggested in Mary Lewis's e-mail to Ms O'Connell of 8 October 2012.

> *a sum greater than that to which an order under that subsection may relate.*

[122] Mr Pickering claims actual lost income of $167,801.04 for the full period up to the dates of the Authority meeting on 6 December 2012. He also claims interest.

[123] The effect of s.128 is that I must be satisfied on the evidence that Mr Pickering has suffered the loss of income he claims because his employment came to an end in the way it did and not for any other reason.

[124] I must also consider whether Mr Pickering has made sufficient efforts to mitigate his loss. I must give credit for money Mr Pickering has earned during the period for which he claims the loss.

[125] Mr Pickering's employment with Sealord ended on 18 October 2010. He got work on mussel harvesting boats as soon as he was able and accepted a trip on the Southern Champion, on which Mr Shuttleworth was skipper.

[126] Since then he has worked a number of roles and at the time of the investigation meeting was working as a fisher for Endurance Fishing Company Limited engaged as an independent contractor.

Did Mr Pickering sufficiently mitigate his loss?

[127] After Mr Pickering's initial voyage on the Southern Champion there would have been further work for him on that vessel if he had wanted it. For Sealord Ms O'Connell submits that in failing to keep taking on work on the Southern Champion Mr Pickering failed to sufficiently mitigate his loss.

[128] I accept Mr Pickering's evidence that the conditions on the Southern Champion were *awful* and that he:

> *… did not feel safe amongst the crew, who continually fought amongst themselves. It was a pretty daunting experience.*

[129] Mr Shuttleworth's evidence is that the working conditions on the Southern Champion were *terrible* and:

> *The calibre of the crew was very poor. I had to lock my cabin every time I left it because of the constant pilfering that occurred on the vessel. They were also unreliable workers at sea.*

[130] Mr Pickering's failure to continue working on the Southern Champion does not amount to a failure to mitigate his loss. He only has to take reasonable steps, not all possible steps, to mitigate his loss. Declining to continue to work with unreliable and poor calibre co-workers, especially when at sea with them for up to three months at a time, is not a failure to take reasonable steps. I do not consider that Mr Pickering's failure to accept more work on the Southern Champion was a failure to mitigate his loss.

[131] Sealord says that the affidavit evidence of Mary Lewis, at the relevant time employed as a human resources advisor**,** establishes that Sealord offered to reinstate Mr Pickering. Ms Lewis' affidavit says that she rang and left a telephone message for Ms Sharma *to offer a return for Aaron*. Just above that and in the same paragraph Ms Lewis wrote:

> *…we agreed to ask Anjela about mediation dates … and also to gauge if Aaron would be interested in returning to Sealord.*

[132] I was unable to hear from Ms Lewis and so was unable to test her evidence. However, I consider it is more likely that her telephone message to Ms Sharma was more in the nature of an exploration about whether Mr Pickering was interested in returning to Sealord.

[133] Ms Sharma's letter to Sealord dated 11 October 2010 records:

> *I write further to your telephone message of Friday the 8th of October last. You inquired as to whether Mr Pickering was interested in continuing to work for Sealord as no letter of termination had been given, or even discussed with him.*

[134] Ms Sharma's letter does not go on to directly respond to that inquiry by way of a counter-offer, for example. However, there was no written offer to reinstate Mr Pickering made by Sealord at any time.

[135] Mediation between the parties took place after that date. I am not able to enquire into what was discussed at mediation about the possibility of reinstatement.

[136] Mr Pickering's evidence is that after Ms Sharma wrote to Sealord on 11 October 2010 there:

> *… were no further steps by Sealord about reinstating me to my position on the Will Watch*

[137] Ms O'Connell submits that if the loss of Mr Pickering's work on the Will Watch was so devastating to his life it was unreasonable for him not to consider Sealord's offer to reinstate him. She submits that the offer was real and genuine and Mr Pickering did not respond to it and therefore should be denied any remedies.

[138] Sealord relies on the Employment Court case of *Murphy and Routhan trading as Enzo's Pizza v Van Beek*[28] to argue that Mr Pickering should not receive any remedies since he did not accept Sealord's offer to reinstate him. In that case Chief Judge Goddard did not find that the employee had a personal grievance so his comments about the refusal of an offer of unconditional interim reinstatement disentitling the employee to remedies are not part of the decision and only speculative comments.

[139] Ms O'Connell also submits that there was a possibility of engaging Mr Pickering on another Sealord vessel or that Mr Pickering could have continued to be paid on a trip off basis and then transferred to the opposite swing shift on the Will Watch. These may have been possibilities but none of those possibilities were put to Mr Pickering at the time as offers of employment aimed at settling his employment relationship problem.

[140] In Mr Pickering's case there is no evidence that amounts to an unconditional offer to re-engage him on the Will Watch in the position of bosun that Mr Pickering ought to have accepted in mitigation of his loss. Sealord did not pursue the idea Ms Lewis sought to explore with Ms Sharma to the point of making an offer to reinstate.

[141] In addition, it is unlikely that Sealord would have made an unconditional offer to reinstate Mr Pickering in the face of evidence that Mr Taylor would be seeking to manage Mr Pickering's performance if he were to be re-engaged.

[142] Overall I find that Mr Pickering acted adequately to mitigate his loss.

[143] In setting an appropriate amount of compensation for lost remuneration I also need to consider what Mr Pickering's employment future on the Will Watch would have been if he had not been dismissed in late 2010.

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[28] [1998] 2 ERNZ 607

[144] The respondent submits that Mr Pickering should only be entitled to lost remuneration for the first three months after his dismissal and that the Authority should not exercise its discretion to grant further lost remuneration. Sealord says it is unlikely that the employment relationship would have lasted longer than one further trip on the Will Watch; being the one that ended on 16 January 2011.

[145] Sealord submits that the necessary trust and confidence Mr Howarth needed to have in Mr Pickering had broken down due to the concern he had passed on confidential information to Mr Shuttleworth. Sealord says Mr Howarth was no longer prepared to have Mr Pickering working on the Will Watch and that his concern about the passing on of confidential information was the primary reason that Mr Pickering was dismissed.

[146] Mr Howarth's and Mr Taylor's evidence is that they met with Mr Pickering to raise their concerns about confidential information just prior to the May 2010 trip. Mr Howarth says that the call from Mr Shuttleworth was in March 2010. During the trip between May and July 2010 Mr Howarth says that he restricted Mr Pickering's access to the wheelhouse and made sure he was not left there on his own to ensure he could not have access to the plots or coordinates of fishing areas or to the vessel's tow log.

[147] It is unclear why the decision was made to dismiss Mr Pickering after the trip that ended in July 2010 but was not conveyed to him until mid-September 2010. At the investigation meeting Mr Howarth agreed that he had never given Mr Pickering any disciplinary warnings. He said he was *sure Aaron has got integrity when it comes to safety* and that the last trip *went relatively smoothly.*

[148] At the time of Mr Pickering's dismissal he had been working on the Will Watch for about three years and nine months. His evidence is that he had never contemplated voluntarily leaving the Will Watch and that despite Mr Howarth being a different type of skipper to Mr Shuttleworth he :

> *…would never have thought about leaving the company for this reason. Chris was known to be a difficult person to work under, but despite this I just kept my head down and did the work. It wasn't about me, as he was like that with everyone. But I just accepted this as being life at sea: some people can be more difficult to work with and in confined spaces.*

[149] There is always a difficulty in trying to look back and consider what may have occurred if the unjustified dismissal had not happened. In this case no adequate investigation was undertaken into the allegation of breach of confidentiality. If Sealord had realised that Mr Pickering was an employee and carried out an adequate investigation and disciplinary process there is a possibility Mr Pickering would have been dismissed for breach of confidentiality.

[150] However, I consider Sealord's submission that the employment relationship had broken down irretrievably to be somewhat undermined by its other submission that Mr Pickering failed to mitigate his loss by not accepting an offer to be re-engaged. Sealord says that at the time of dismissal the primary concern was Mr Pickering's suspected breach of confidentiality and its suspicion he would continue to pass on information to Mr Shuttleworth. If the employment relationship had irretrievably broken down for that reason I consider it unlikely that Mr Taylor would have agreed that Mr Pickering could have been re-engaged by Sealord as proposed.

Lost remuneration

[151] Under s.128(2) I must reimburse Mr Pickering for income lost in the three months, or 13 weeks, after his dismissal. Any further reimbursement is discretionary.

[152] The parties agree Mr Pickering was dismissed as at 18 October 2010; 17 January 2011 is thirteen weeks later. Over that period Mr Pickering earned $8,505 from Marlborough Mussel Co Ltd and $1,887 from Sanford Ltd.

[153] Following some questioning at the investigation meeting by Sealord's advocate about Mr Pickering's post-dismissal work for Austral Ltd on the Southern Champion Mr Pickering provided some further evidence of his earnings from Austral Fisheries[29], being $20,291.02 gross, which had been inadvertently missed from his evidence. It had not been included in his IRD summary to 31 March 2011.

[154] Mr Pickering's work on the Southern Champion took him from 14 December 2010 until 7 March 2011, which takes us past the mandatory 13 weeks reimbursement.

[29] By way of affidavit dated 21 December 2012.

[155] I heard evidence about Mr Pickering's post-Will Watch anticipated earnings had he remained employed on the Will Watch from Heidi Tapper, a chartered accountant.

[156] Ms Tapper's calculations were based on what Mr Pickering had earned in his time on the Will Watch. She calculated Mr Pickering's actual lost earnings for 2011 based on what he had earned from Sealord in the full 2008 and 2009 tax years. She estimated that Mr Pickering would have earned a further $78,090.01 gross[30] if he had remained on the Will Watch in the year to 31 March 2011; a total of 23 weeks since dismissal.

[157] Darryl Smith, the vessel co-ordinator for Will Watch from late 2010, prepared a table he says show the Will Watch bosun's actual earnings from the first trip without Mr Pickering in October 2010 until the voyage that ended on 13 November 2012.

[158] Mr Smith's figures suggest Mr Pickering would only have earned a further approximately $50,468.53 to 31 March 2011.

[159] Voyages at different times of the year relative to the orange roughy's breeding cycle generate different sizes of catch. For example, the trip that Mr Pickering expected to go on in October 2010 was an Alfonso run and it is agreed by both parties that it is usually a trip in which a large catch can be expected, and therefore large catch shares. Mr Smith's figures do not show that it was particularly profitable. Ms Tapper's method of calculation takes into account the variance expected over the full 12 month period of the tax year based on past figures.

[160] Ms Tapper's calculations include an allowance for inflation. At first I considered that may have been unreasonable given the type of industry because I had no evidence that the pay of fishermen was adjusted annually to allow for inflationary costs.

[161] The principles I need to apply in exercising my discretion to award lost remuneration for more than three months were set out by the Court of Appeal in *Telecom New Zealand Limited v Nutter*[31]:

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[30] Including PAYE and ACC levies, which Mr Pickering will become liable to pay to IRD.
[31] [2004] 1 ERNZ 315 at [78] to [79].

- A full assessment of the loss merely sets the upper limit for the amount of compensation. There is no automatic entitlement to full compensation.

- Moderation is appropriate. The discretionary nature of the remedy is obviously inconsistent with any principle requiring "full" compensation to be awarded.

- The concept of unjustifiable dismissal is flexible and a full compensation approach may be disproportionate to the nature of the wrong.

- Full compensation may be unnecessarily and inappropriately damaging to the employer (and indirectly to the position of other employees of the same employer).

- Rules of thumb as to appropriate measures of compensation can facilitate both the efficient dispatch of litigation and reasonably predictable outcomes.

- A community expectation of "full" compensation extending to compensation for years of foregone remuneration could discourage employment and personal rehabilitation.

- Compensation which exceeds the equivalent of 12 months remuneration can be awarded. The assessment of compensation in any particular instance must be individualised to the circumstances of the case.

- Full compensation must be assessed in light of all contingencies and in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment.

[162] As of right Mr Pickering is entitled to be paid lost remuneration for the first 13 weeks after his dismissal.

[163] In addition and taking all the circumstances into account I consider that a moderate and reasonable award of lost remuneration under s.128(3) is for a period of a further 37 weeks on top of the mandatory 13 weeks remuneration; that is to the end of the trip on that began in April 2011. In assessing a reasonable moderate amount of compensation I have made an allowance for unpredictable contingencies, such as any deterioration in Mr Howarth's and Mr Pickering's working relationship.

[164] I undertook my own rough calculations based on the average of what Mr Pickering earned on the Will Watch in the three full tax years he worked ending 31 March 2008, 2009 and 2010. He earned an average of $175,226.66 per year; which is $3369.74 per week.

[165] Overall, I am satisfied that Ms Tapper's calculations are more reasonable and more robust than my own. However, in an industry like fishing it is not always

reasonable to rely on past earnings as the main predictor of future earnings. Therefore, I also consider it reasonable to take into account Mr Smith's record of the Will Watch bosun's actual income over the relevant periods. In a broad brushstroke approach I take the average of Ms Tapper's calculation of anticipated loss and Mr Smith's record of earnings over approximately the same period to find that Mr Pickering's anticipated loss over the 23 weeks to the end of March 2011 following his dismissal was $64,279.72.

[166] When Mr Pickering's actual earnings of $30,683.02 over that period are subtracted his loss of remuneration to 31 March 2011 comes to $33,596.70.

[167] In addition, Ms Tapper calculated that Mr Pickering would have earned $178,497.87 gross from work on the Will Watch in the year to 31 March 2012.

[168] Mr Smith's figures are less clear because they are broken down by trip rather than tax year. They show that from 17 April 2011 to 13 November 2012 the bosun on Will Watch earned approximately $231,551.39. That was over a period of 50 weeks; which comes to an amount of $4,631.03 per week or $240,813.44 over a 52 week period.

[169] I take the same broad brushstroke approach as I took above and take the average of Ms Tapper's anticipated loss value being $178,497.87 and of Mr Smith's figure of $240,813.44 to reach a figure of $209,655.65 of loss of earnings from 1 April 2011 to 31 March 2012. That comes to $4,031.84 per week.

[170] Over that period of time Mr Pickering earned $92,266.59, or $1,774.36 per week.

[171] The period of 37 weeks after 17/18 January 2011 takes us to the end of the trip on 27 July 2011; or 17 weeks after 31 March 2011.

[172] When I multiply $4,031.84 per week by 17 weeks Mr Pickering's anticipated loss of earnings was $68,541.28. His actual earnings were $1,774.36 x 17 weeks = $30,164.12. Therefore, Mr Pickering should be paid lost remuneration of $38,377.16 for that period.

[173] When that is added to the amount of $33,596.70 remuneration lost up to 31 March 2011 Mr Pickering is entitled to be remunerated $71,973.86.

Compensation

[174] Assessment of Mr Pickering's claim for $20,000 under s.123(1)(c)(i) must be based on evidence of humiliation, loss of dignity and injury to his feelings arising out of his dismissal.

[175] Mr Pickering says that he was in a state of shock over the loss of his job. He says that the time immediately after his dismissal was one of the most distressing times of his life. He found it particularly hard to get used to the fact that he was unable to get meaningful work that paid sufficiently to financially support and provide well for his daughters.

[176] Mr Pickering says that he became isolated from friends and family due to the damage to his self-worth caused by his dismissal. For a time he became financially dependent on help from his uncle which was demoralising for him. He says:

> *…I sank to an all-time low. I reached a point where I could not cope, and could not see light at the end of the tunnel….there was no turning back, despite grieving for what I had lost, and wanted back so badly. I started drinking heavily. I just wanted to drown my sorrows. I became reclusive and could not bring myself to talk with others.*

[177] Mr Craddock's and Mr Harris' evidence confirmed that Mr Pickering started to drink heavily as a result of his dismissal and his inability to find well paid work. In all the circumstances I consider an award of $8,000 compensation is warranted.

Contribution

[178] Having determined Mr Pickering has a personal grievance under s.124 of the Act I must now consider whether he contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly.

[179] The evidence fails to establish that Mr Pickering engaged in any blameworthy conduct that gave rise to the personal grievance so remedies are not to be reduced on the grounds of contribution.

Interest

[180] Mr Pickering has applied for interest on his lost remuneration. Clause 11 of Schedule 2 of the Employment Relations Act gives the Authority power to award interest in matters involving the recovery of money at the rate prescribed under

section 87(3) of the Judicature Act 1908. The prescribed rate is currently 5% per annum.

[181] The purpose of an award of interest is to compensate a successful party for the loss of use of the money between the time the money should have been paid and when it is actually paid.

[182] Had he remained employed on the Will Watch Mr Pickering would not have received all the money at one time.

[183] I consider it reasonable that Sealord pay 5% interest on the full amount of remuneration ordered from 28 July 2011 which is the date the full amount would have been paid if Mr Pickering had not been dismissed.

Costs

[184] Mr Pickering as the successful party is entitled to a reasonable contribution towards his actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Mr Pickering has 28 days within which to file a costs memorandum and Sealord has 14 days within which to respond.

[185] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The hearing took two full days; that is nominally $7,000. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority