

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2019] NZERA 571
3043711

BETWEEN KIM ASHBY
 Applicant

AND NIWA VESSEL
 MANAGEMENT LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Steven Zindel for Applicant
 Penny Shaw for Respondent

Investigation Meeting: 23 July 2019

Submissions Received: 1 August 2019 from Applicant
 12 August 2019 from Respondent

Determination: 07 October 2019

DETERMINATION OF THE AUTHORITY

- A. Ms Ashby was unjustifiably dismissed.**
- B. NIWA Vessel Management Limited is ordered to pay to Ms Ashby the following within 28 days of the date of this determination:**
- a) an amount equivalent to three months lost wages from 15 December 2014 under s 123(1)(b) of the Employment Relations Act 2000; and**
 - b) the sum of \$20,000 under s 123(1)(c)(i) of the Employment**

Relations Act 2000.

C. Costs are reserved.

Employment relationship problem

[1] Ms Ashby has had a long association with NIWA Vessel Management Limited (NIWA). Ms Ashby was originally employed by NIWA as an Assistant Steward in 1996. At the end of 1996 her position was disestablished and her employment ended by reason of redundancy.

[2] Between 2 January 1997 and 2003 Ms Ashby was employed on a temporary basis as Relieving Steward and Second Cook. From 13 October 2003 until 15 December 2015 Ms Ashby was employed on a permanent basis as Cook aboard the RV Tangaroa.

[3] RV Tangaroa is a large research vessel which operates two alternating crews. Each crew works approximately month on, month off over the calendar year and usually spends about six months a year at sea. Crew join the vessel a day or so prior to the vessel leaving port and at this time the Head Cook must ensure all supplies are loaded and stowed away. The Head Cook is responsible for setting the menu and ordering all supplies.

[4] The crew live in close, confined living quarters 24 hours a day, seven days a week while at sea and contact with friends and family is limited. The vessel complement includes the 16 crew plus other seagoing passengers. When there is less than 24 people on board the Head Cook will be responsible for all cooking duties. When the number is 24 or more a second cook can be employed. The Head Cook supervises the Second Cook.

[5] It was common ground that in 2009 Ms Ashby made a formal complaint about the conduct of First Mate Solly (as he was then). The complaint was investigated and the First Mate was issued with a warning and apologised to Ms Ashby.

[6] Ms Ashby says that while she complained of conduct stopped the First Mate continued to bully her. The First Mate was promoted to Master on 7 July 2011.

[7] Ms Ashby suffered a work place injury on 5 August 2011 and as a result of her injury was unable to work for a year, returning to work on 26 September 2012.

[8] By 2014 Ms Ashby was the Head Cook. She believed she was subject to bullying behaviour by Mr Solly and requested a move to the second swing. Ms Ashby commenced a period of sick leave which she says was the result of NIWA's failure to move her from Master Solly's crew.

[9] Ms Ashby was given notice of dismissal on 14 October 2015. NIWA says Ms Ashby's refusal to work with Master Solly meant her continued employment was incompatible and dismissal was a valid option. Ms Ashby's last day of work was 15 December 2015. She challenges the dismissal which she says was unjustified.

Issues

[10] In order to resolve Ms Ashby's application I must determine whether NIWA's action in dismissing Ms Ashby for reasons of incompatibility was a decision an employer acting fairly and reasonably could make or whether Ms Ashby was unjustifiably dismissed.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Relevant policies

[12] NIWA has published a number of policy documents relevant to this matter including documents dealing with the following:

- a) Unacceptable behaviour policy;
- b) Unacceptable behaviour definitions; and
- c) Unacceptable behaviour complaints policy

[13] The unacceptable behaviour definitions document sets out NIWA's definition of bullying in the following terms:

Bullying is behaviour that NIWA regards as unacceptable in the workplace.
Bullying is:

- Grounds for the recipient to take a personal grievance case against NIWA
- Classified by NIWA as conduct which may result in dismissal.

Definition of Bullying

Workplace bullying is unwanted and unwarranted behaviour that:

- A person finds offensive, intimidating or humiliating, and
- Is repeated so as to have a detrimental effect on a person's dignity, safety and well-being.

Types of bullying behaviour – overt

- Open hostility and acts of intimidation
- Public humiliation and ridicule, teasing
- Abusive or degrading language and gestures
- Constant criticism or accusations
- Unjustified threats of dismissal or unfair treatment, coercion

Types of bullying behaviour – covert

- Undermining a person's work or reputation
- Setting unrealistic and impossible deadlines – over pressuring
- Inflicting mental tasks, under-work, unwarranted removal of responsibility
- Constantly changing targets and expectations
- Spreading malicious rumours
- Ignoring and isolating a person from needed support, communication or resources
- Unreasonable administrative sanctions, interference, setting people up to fail
- Taking credit for another's ideas, refusing to give credit where due

2009 incident

[14] In 2009 Ms Ashby made a formal complaint about the conduct of First Mate Solly (as he was then). Ms Ashby claimed she had been sexually harassed by First Mate Solly in relation to inappropriate comments he made to Ms Ashby and inappropriate pictures being put onto Ms Ashby's computer.

[15] The complaint was investigated by NIWA and resulted in the First Mate formally apologising to Ms Ashby and he was issued with a written warning.

[16] It would be fair to say that this incident informed Ms Ashby's opinion of Mr Solly for the rest of her career with NIWA.

2011 warning

[17] On 22 March 2011 Ms Ashby was observed by the Night Watchman at Wynyard Wharf returning to the vessel in an intoxicated state. The Night Watchman had been told by the driver of the car dropping Ms Ashby off, that she had been refused service at a bar due to her intoxication.

[18] The conduct was viewed as serious misconduct and after a disciplinary process Ms Ashby was issued with a first and final written warning. Ms Ashby did not challenge the warning. It was valid for a period of six months and NIWA did not have reason to place any reliance on the warning.

[19] First Mate Solly was present during the disciplinary process however, the decision maker was Mr Greg Foothead, General Manager of Vessel operations.

2011 workplace injury

[20] Mr Solly was appointed as Master of the vessel on 7 July 2011.

[21] On 5 August 2011 Ms Ashby suffered a workplace accident while working in the galley. Despite being injured Ms Ashby continued to carry out her cooking duties until the vessel berthed in Wellington on 12 August 2011.

[22] On berthing NIWA arranged for Ms Ashby to be seen by a medical doctor who declared her unfit for work for a period of 14 days. The injury took longer to heal than at first envisaged. Ms Ashby was cleared to return to work more than twelve months after her injury, in September 2012.

[23] Ms Ashby has been critical of Master Solly for not arranging a medical evacuation for her on 5 August 2011. This complaint first arose in March 2014 more than 18 months after the accident.

[24] I have accepted the evidence given by Mr John Hadfield, Operations Manager, that if Ms Ashby had felt she needed to be taken off the vessel at the time of her injury she should have raised it with the Master (Mr Solly) and he would have had to act on

that in consultation with Mr Foothead or himself. Mr Hadfield told me that if a Master does not act on such requests they make themselves liable.

[25] There was one other issue that became a concern for Ms Ashby which is that while she was away on ACC Master Solly's son (Mr Solly Junior) had been appointed as a Second Cook. When Ms Ashby returned to work she had to work with Mr Solly Junior who Ms Ashby found to be generally unmotivated. Ms Ashby told me she had to wake him up for work many times and her direct communications with Master Solly stopped and were usually done via Mr Solly Junior. Ms Ashby was also concerned about what she said around Mr Solly Junior because of concerns that it would be passed on to Master Solly.

[26] Ms Ashby worked with Mr Solly Junior on five consecutive swing shifts from September 2012 to May 2013.

Allegations of bullying

March 2014 Meeting

[27] On 24 March 2014 Ms Ashby met with Mr Foothead and Mr Hadfield where she raised concerns about Master Solly's behaviour toward her. Ms Ashby requested that the meeting remain confidential and requested a move to the second swing shift.

[28] In particular Ms Ashby told Mr Foothead and Mr Hadfield:

- a) When she had hurt her back on 5 August 2011 she had been expected to fulfil all of her duties without any help or assistance and should have been medically evacuated from the vessel;
- b) There was a communication problem between her and Master Solly and he was not keeping her up to date with changed plans, arrival dates and the comings and goings of various people;
- c) Because all of the crew and officers were friends there was no confidentiality;
- d) She was blamed for an incident where hair was found in breakfast food and when the Second Cook told the Master it was her (the Second Cook's)

responsibility he did not acknowledge her or respond to her. Ms Ashby believed the hair incident had not been dealt with properly and only those in the galley, the person who found the hair and the Master should have known about it, however, the whole crew were aware of it. Ms Ashby felt her reputation had been tarnished by the incident given the number of people who were aware of it.

[29] As a result of this meeting Mr Hadfield undertook to speak with the Head Cook on the second swing shift about a possible swap. Mr Hadfield did speak to the Head Cook who initially said he would think about it but later told Mr Hadfield he was happy where he was and would not agree to a move. Mr Hadfield told me he did not feel it was appropriate to intervene in his decision not to move.

Christine McCarrison

[30] During the March 2014 meeting Ms Ashby was supported by Ms Christine McCarrison, a Second Cook on the Tangaroa.

[31] Ms McCarrison gave evidence at the investigation meeting in support of Ms Ashby. In relation to Master Solly's behaviour, she told me of an incident which she raised with NIWA in April 2015. The incident arose when Master Solly refused to allow Ms McCarrison to work because her seafarer's medical certificate had lapsed. All crew members must hold a current seafarer's medical certificate in order to sail on the vessel.

[32] Prior to embarking the vessel in Auckland Ms McCarrison had contacted Mr Foothead to ask if she could cancel a doctor's appointment in Auckland to renew her medical certificate and instead do it in Wellington. Mr Foothead agreed she could. When Master Solly learned that Ms McCarrison's medical certificate had lapsed he had Ms Ashby remove Ms McCarrison from the vessel.

[33] Mr Foothead told me he was under the misunderstanding that Ms McCarrison's medical certificate had not lapsed but was about to lapse which is why he approved for her to continue with the voyage to Wellington.

[34] I find on balance Mr Foothead failed to properly clarify the situation before approving for Ms McCarrison to remain on the vessel. That failure put Ms McCarrison in a situation where Master Solly then had no option but to refuse Ms McCarrison access to the vessel to work. The situation caused distress for both Ms McCarrison and Ms Ashby. As the Head Cook and Ms McCarrison's supervisor Master Solly required Ms Ashby to remove Ms McCarrison from the vessel.

Email leak of 2009 complaint – invitation to a disciplinary meeting

[35] On or about 6 August 2014 Ms Ashby was told by Master Solly that an email containing details of her 2009 complaint against Master Solly had been released by email to five NIWA Scientists two of whom would be on board the vessel when it departed.

[36] Ms Ashby raised her concerns about this email being released with Mr Foothead on 18 August. In her 18 August email Ms Ashby complains about having to receive the information informally from Master Solly rather than being advised by management.

[37] Mr Foothead emailed Ms Ashby on 19 August apologising for any distress caused to her. Mr Foothead explained that he had accidentally attached the letter inviting Master Solly to a disciplinary meeting to discuss the sexual harassment complaints to an email he was sending to Master Solly and the scientists.

[38] In his email to Ms Ashby, Mr Foothead assured her that the letter did not disclose any specific details of her complaint. He told her that when he realised what he had done he attempted to recall the email from the recipients. This was successful in the case of four of the five recipients but one, in addition to Master Solly had already read it. Mr Foothead assured Ms Ashby that he had since spoken to the person and they confirmed their understanding of the sensitive nature of the situation and had assured Mr Foothead of their discretion.

Formal raising of complaints

[39] Following the email incident Ms Ashby sought legal advice and through her lawyer, on 5 September 2014 she reiterated her request for a swap to the second swing

shift. In addition to the request for a change in crew, Ms Ashby reiterated the concerns she had raised in March 2014 and raised the following additional concerns:

- a) That after she returned to work in 2012 Master Solly would only deal with his son and the other Second Cook on Galley matters and not Ms Ashby;
- b) Master Solly did not update her on timing changes, visitors, course changes, and would not provide her with weather updates or forewarn her when very rough weather is expected;
- c) Master Solly would ask others what Ms Ashby was doing when the vessel was in dry dock but would not ask her directly;
- d) Master Solly would not allow Ms Ashby to take Sunday afternoons off work when the ship was in port, even though other crew members were allowed to and prohibited Ms Ashby from leaving the ship in Papua New Guinea even though other crew were allowed;
- e) Master Solly insisted Ms Ashby attend the Bridge to sign off the company rules, procedures and information folder when the First Mate was happy for her to take it to the lounge to read;
- f) Master Solly logged an incident reported to him that cigarette ash had been seen in Ms Ashby's cabin during a practice drill searching for stowaways without advising Ms Ashby she had been logged.

[40] Ms Ashby stated she had been subjected to behaviour from Master Solly that others were not subjected to and that she felt she was being subjected to on-going punishment by Master Solly as a result of her raising a legitimate complaint against him (this refers to the 2009 complaint).

October 2014 meeting

[41] Ms Ashby commenced a period of sick leave on 15 September 2014. Although she was on sick leave Ms Ashby agreed to meet with Mr Foothead and Ms

Amy Bennett, Human Resources Manager to discuss the contents of her letter. The meeting took place in October 2014.

[42] There are no notes from the meeting however, it was common ground that the discussion resulted in an agreement that an independent facilitator would be engaged to work with Ms Ashby and Master Solly in an effort to restore their relationship.

Facilitation

[43] Ms Ashby and Master Solly participated in the agreed facilitation on 20 November 2014. The facilitator sent an email report about the facilitated meeting on 24 November 2014. The email was sent to Ms Ashby, Master Solly, Mr Foothead and Ms Bennett.

[44] In his report the facilitator set out a number of agreements he says were reached between Ms Ashby and Master Solly during the facilitation and which were designed to assist in them developing a better working relationship. He recorded an indication from Ms Ashby that she would look to resume her duties for a voyage scheduled to depart Wellington on 28 January 2015.

[45] At the end of his report the facilitator made two specific recommendations:

- a) both Ms Ashby and Master Solly reply briefly to the email with any further thoughts or reflections they had since the meeting; and
- b) a joint conversation be held once Master Solly's current voyage had ended, to check on the agreements made.

[46] Ms Ashby told me that the points noted in the report were not fixed agreements and she expected to meet with the facilitator and Master Solly in January 2015 to reach a final agreement.

[47] On 15 December Ms Ashby wrote to NIWA setting out her experience of the facilitation which was not positive. In her letter she raised concerns about Master Solly's conduct during the facilitation and advised NIWA she found the meeting traumatic. Ms Ashby advised NIWA of the physical symptoms she was experiencing

at that time and asked NIWA to reconsider its decision regarding the swap of swing shifts and allow her the opportunity to sail with the second crew.

[48] Apart from Ms Ashby's letter of 15 December to NIWA, neither she nor Master Solly replied directly to the facilitator's email. Neither did NIWA make arrangements for the joint conversation to occur in January 2016. This is despite the facilitator's undertaking that he would discuss the outcomes with Mr Foothead and Ms Bennett to ensure his two recommendations were attended to.

Independent investigation into bullying claims

[49] NIWA did not respond to Ms Ashby's 15 December letter and in January 2015 Ms Ashby provided NIWA with further medical certificates stating that she was not fit for work. As a consequence of the further medical certificates Ms Ashby's anticipated return to work in January 2016 did not transpire.

[50] Because the issues between Ms Ashby and Master Solly remained unresolved, on 2 March 2015 NIWA advised Ms Ashby it would be conducting a formal investigation into Ms Ashby's allegations of bullying. NIWA appointed an independent investigator for that purpose.

[51] The investigation was to commence in April, however due to availability problems the investigation was delayed with a final report being received by NIWA in September 2015.

[52] The investigator concluded Master Solly's behaviour did not support a finding that meets the WorkSafe definition of bullying or harassment. In reaching that conclusion the investigator noted Master Solly's communication style is very direct, straight to the point and blunt which may not have suited Ms Ashby. The investigator also noted:

[Master Solly] needs to consider different communication styles and management approaches for different situations and people and NIWA needs to provide him with some further training and support in regards to this.

[Master Solly] needs to ensure he remains professional in all his interactions with the crew and consider his tone, manner and approach in all his interactions. He should consider providing more information in regards to decisions and rationale for change so that he gets people on board with him and to ensure they don't misunderstand the reasons behind these decisions.

[53] The investigator reported that from his experience in dealing with Ms Ashby she sometimes chose not to listen to or did not understand what had been explained to her. The investigator noted that Ms Ashby appeared to view situations suspiciously or as a personal attack towards her even when reasonable explanations are provided to her.

[54] In summary the investigator concluded there was no evidence of repeated, persistent and unreasonable behaviour by Master Solly which involved victimising, humiliating, intimidating or threatening treatment toward Ms Ashby. The investigator did find there were one off occasional incidents by Master Solly that could be considered poor judgement, unreasonable and an inappropriate management and communication style.

[55] The investigator expressed the view that the trust and confidence Ms Ashby had with Master Solly and NIWA was irreparable and would not recommend that NIWA request a transfer and a return to work for Ms Ashby on any NIWA crew. The investigator recommended NIWA enter into discussions with a view to exiting Ms Ashby and that if those discussions were not successful NIWA should consider terminating Ms Ashby's employment on the grounds of incompatibility. The investigator noted that the breakdown of the relationship had been shown during the investigation to be substantially attributable to Ms Ashby.

Psychologist report

[56] Concurrently with the independent bullying investigation NIWA referred Ms Ashby to a Clinical Psychologist to provide an assessment of how NIWA might be able to assist her return to work.

[57] The Psychologist recommended Ms Ashby be offered counselling, that NIWA nominate a senior colleague with whom Ms Ashby could check in and arrange preparation and/or debriefing meetings.

[58] The Psychologist noted there was no current mental health disorder and did not expect Ms Ashby to be impaired or incapable of engaging in employment in any appropriate work environment. The Psychologist noted that if Ms Ashby was

required to return to work under Master Solly she was unable to predict whether Ms Ashby would be able to withstand any further unprofessional behaviour without it affecting her health and wellbeing.

[59] The Psychologist noted that Master Solly had just commenced a period of three months leave and recorded her confidence that Ms Ashby could successfully return to work and recommended NIWA consider offering a trip or two to Ms Ashby during the Master's absence on leave as this would give both NIWA and Ms Ashby the opportunity to test how she might cope.

The dismissal

[60] NIWA wrote to Ms Ashby on 8 September 2015 (who was still absent on paid sick leave) after receiving the reports from the independent investigation and the Psychologist. NIWA invited Ms Ashby to attend a meeting to discuss:

- a) Ms Ashby's unwillingness to move forward with the outcomes put in place at the facilitated meeting on 20 November 2014;
- b) The Psychological assessment which indicates there was no impairment to Ms Ashby returning to work; and
- c) The investigation report that found the complaints about Master Solly unsubstantiated.

[61] In its letter NIWA states that it seemed likely Ms Ashby's relationship with Master Solly had become irreconcilably incompatible and attributed the breakdown in the relationship to Ms Ashby. In particular NIWA concluded Ms Ashby had failed to follow through with the agreements reached in the facilitation and continued to refuse to work with Master Solly to support of its allegation of irreconcilable incompatibility attributable to Ms Ashby.

[62] A meeting to discuss the issues set out in the 8 September letter took place on 24 September 2015. During that meeting Ms Ashby reiterated her request to be moved to the second swing shift. NIWA declined her request. Mr Foothead told Ms Ashby that it was important from a health and safety perspective that the crew on board a vessel work as a team, that he had discussed with the Head Cook on the

second shift and he was reluctant to move as he had worked with his crew for many years. Mr Foothead told Ms Ashby that he believed termination was the only option.

[63] NIWA wrote to Ms Ashby on 28 September setting out its view of the meeting including that Ms Ashby had accepted there was incompatibility with Master Solly when she requested a move to the second swing shift. NIWA confirmed Mr Foothead's view which he expressed in the meeting that Ms Ashby's request to be transferred was not a viable option. NIWA proposed terminating Ms Ashby's employment due to incompatibility and invited her to provide a response in writing by 1 October 2015.

[64] Ms Ashby made no response to the proposal to terminate her employment and on 14 October 2015 NIWA wrote to Ms Ashby confirming its decision to terminate her employment. NIWA gave Ms Ashby two months' notice that her employment would terminate on 14 December 2015.

Was the dismissal justified?

[65] Ms Ashby was dismissed due to incompatibility. It is recognised that there may be rare occasions when it will be appropriate for an employer to terminate an employment relationship on the grounds of incompatibility. The onus is on the employer to justify the dismissal by establishing that irreconcilable incompatibility existed, that the irreconcilable breakdown in the employment relationship was attributable wholly or substantially to the employee and the employer effected the dismissal in a procedurally fair manner.¹

[66] In assessing whether NIWA has established the necessary elements justifying the dismissal in terms of the statutory test in s 103A of the Act I have followed the approach taken by the Court in *Walker v Procare Health Limited* and have taken a holistic approach to the whole employment relationship.²

Was there an irreconcilable incompatibility?

[67] Ms Ashby raised a number of complaints in March 2014 about Master Solly's conduct toward her. At that meeting Ms Ashby requested to be moved to the second

¹ *Mabry v West Auckland Living Skills Homes Trust Board* (2002) 6 NZELC 96,573 (EmpC) at [36].

² *Walker v Procare Health Limited* [2012] NZEmpC 90 at [82].

swing shift. This request was put to the Head Cook on the second shift but he declined.

[68] The March meeting was followed by a formal complaint in August after the email incident which had been notified to Ms Ashby by Master Solly who indicated the issue may be being revisited. Ms Ashby reiterated her request to swap shifts and again, this request was declined.

[69] Ms Ashby commenced a period of sick leave from which she never returned. While she attended facilitation during her sick leave and some agreements were reached about how the relationship between Ms Ashby and Master Solly would operate following her return to work, Ms Ashby raised concerns in December about Master Solly's conduct during the facilitation.

[70] The facilitator made two recommendations. Neither of these recommendations were followed up either by the facilitator or NIWA. By January 2014 Ms Ashby could not see any way back to working on the same shift as Master Solly and would only return to work if she was swapped to the second shift.

[71] I find there was a high degree of incompatibility between Ms Ashby and Master Solly. However for the reasons that follow I am not satisfied NIWA has established that the incompatibility was irreconcilable.

[72] At the facilitated discussion on 20 November and according to the facilitator's report there was considerable discussion and apparent agreement between Ms Ashby and Master Solly about how they might work together in the future.

[73] The Psychologist reported that Ms Ashby could return to an "appropriate work environment". This may have included a work place where Master Solly had undertaken training in how to manage and communicate with staff, although the Psychologist reported that Ms Ashby would need many new positive experiences in Master Solly's presence or other compelling evidence of his change of heart in order for her to work with him.

[74] After Ms Ashby was dismissed Mr Solly was provided with management training. Mr Foothead told me Master Solly responded well to the training and his brash and abrasive approach has changed and he has become “mellow” in his responses.

[75] For the foregoing reasons I am not satisfied the point had been reached where NIWA could say the incompatibility between Ms Ashby and Master Solly was irreconcilable.

Was Ms Ashby substantially responsible for the irreconcilable breakdown?

[76] The conclusion that Ms Ashby was substantially responsible for the breakdown in her relationship with Master Solly was raised by the independent investigator who investigated Ms Ashby’s complaints.

[77] It was apparent to me, on reading the investigator’s report that NIWA did not provide the investigator with its own policies and procedures as they relate to bullying in the workplace. Instead the investigation report relies solely on the definition of bullying provided by WorkSafe New Zealand. Whether the investigator would have reached different conclusions with respect to Ms Ashby’s complaints if NIWA’s definition of bullying had been used cannot now be known.

[78] For the following reasons I am not satisfied NIWA has established that Ms Ashby was substantially responsible for the breakdown of the relationship between her and Master Solly:

- a) The investigator reports both Ms Ashby and Master Solly acknowledged during the investigation that there were times that they were not communicating with each other.
- b) Regarding the accident on 5 August the investigator reports that there is a lack of clear processes at NIWA when an injury occurs for a position such as Ms Ashby’s where there is no backup.
- c) The investigator records in relation to the appointment of Mr Solly Junior that it was unfortunate he continued working on the vessel after Ms

Ashby's return and Mr Foothead had conceded it was not a good idea. The investigator also notes that other crew members were also having issues with Mr Solly Junior and his performance was not well managed.

- d) In relation to the hair incident the investigator is critical of Master Solly's approach as being unprofessional and insensitive. He notes that Master Solly acted inappropriately, showed poor judgement and a lack of understanding of different management approaches for relevant situations. The investigator reports that Master Solly acknowledge he showed poor judgement when he questioned Ms Ashby and pushed for a response about a private conversation she had had with Mr Foothead.
- e) The investigator reports that Master Solly advised in his interview that since 2009 there had been a level of distrust between himself and Ms Ashby. The investigator notes that it was evident from the investigation that the distrust is mutual.
- f) The investigator recommended Master Solly consider different communication styles and management approaches when dealing with different situations and people and that NIWA provide Master Solly with further training and support to assist in this.
- g) The investigator noted that Master Solly needed to ensure he remained professional in all his interactions with the crew and consider his tone, manner and approach in all his interactions.

[79] The findings in the report demonstrate that the problems between Ms Ashby and Master Solly were not substantially created by Ms Ashby and that the incompatibility was mutual. As her Manager Master Solly had obligations to treat Ms Ashby fairly and reasonably which includes acting professionally and communicating clearly.

Was Ms Ashby treated in a manner which was procedurally fair?

[80] I have concluded Ms Ashby was not treated fairly by NIWA. After Ms Ashby raised her concerns in March 2014, apart from asking the Head Cook on the second

shift if he would swap crews NIWA took no further steps to assist Ms Ashby and Master Solly to repair the relationship until after Ms Ashby commenced sick leave in September 2014.

[81] Even then NIWA failed to follow the recommendations made in the facilitator's report dated 24 November and did not follow up Ms Ashby's complaints about Master Solly's conduct at the facilitation meeting. NIWA then failed to follow up the suggestion by the Psychologist to have Ms Ashby return to work while Master Solly was absent on leave.

[82] While Mr Foothead relied on the refusal by the Head Cook on the second shift to swap shifts, there was nothing in the applicable terms and conditions of employment that prevented NIWA from making a temporary or permanent swap of shifts. Mr Foothead acknowledged at the investigation meeting that employees are appointed to a position and not to a particular crew or vessel.

Conclusion

[83] For the reasons set out above I have concluded NIWA has not established there was an irreconcilable incompatibility substantially caused by Ms Ashby. The decision to dismiss in all the circumstances of this case was not a decision an employer acting fairly and reasonably could make.

[84] Ms Ashby's dismissal is unjustified and she is entitled to a consideration of remedies.

Remedies

[85] Ms Ashby claims lost wages from the date her employment ended to the date of this determination together with compensation under s 123(1)(c)(i).

[86] Ms Ashby was given two months' notice on 14 October 2015 and her employment ended on 14 December 2015. Ms Ashby obtained temporary alternative employment in June 2016 working as a chef for a logging company and further alternative employment following the end of the temporary assignment but has struggled to find comparable work.

[87] I am satisfied Ms Ashby has attempted to mitigate her loss and to a limited extent has succeeded. The Authority has discretion under s 128(3) of the Act to order a sum of compensation for lost remuneration greater than the three month period. I have declined to exercise my discretion in this case as there is no guarantee, given Ms Ashby's resolute refusal to work with Master Solly, that her employment would not have ended within the three months after 14 December 2015 for reasons other than incompatibility.

[88] Ms Ashby says she experienced significant distress from her dismissal and her consequent financial downturn. Ms Ashby says she had ongoing health issues for which she sought medical advice. These health issues included having trouble sleeping, suffering from alopecia and sores started appearing on her skin.

[89] The Psychologist who examined Ms Ashby in September 2015 confirms the health issues affecting Ms Ashby during her time on sick leave but reports that by the date of his report Ms Ashby's symptoms had been adequately treated, her hair was growing back and the sores on her skin had started to fade. Based on that report I have concluded Ms Ashby's physical symptoms had in large part been resolved before her dismissal.

[90] At the investigation meeting Ms Ashby's sister told me of the high level of distress caused to Ms Ashby as a result of her dismissal.

[91] Ms Ashby's evidence and the evidence of her sister shows the impact of the dismissal on Ms Ashby was significant. She was unable to find comparable employment and had to seek assistance from the Ministry of Social Development in the form of a benefit which Ms Ashby found difficult.

[92] Ms Ashby seeks payment of \$20,000 under s 123(1)(c)(i). Having considered recent decisions from the Court which provide guidance on assessing quantum I consider \$20,000 to be an appropriate award.³

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

Contribution

[93] I have awarded remedies and so in accordance with s 124 of the Act I must consider whether Ms Ashby has contributed to the situation that gave rise to her personal grievance.

[94] In its submissions NIWA has invited me to reduce Ms Ashby's remedies on the basis that Ms Ashby failed to raise issues and concerns in a timely manner. The only issue not raised by Ms Ashby in close proximity to the event is the issue about Master Solly not evacuating Ms Ashby after her accident on 5 August 2011 until more than 18 months later. I have concluded Ms Ashby raised this matter at the 24 March 2014 meeting as an example of the type of issues she was experiencing with her manager. She also raised a number of more recent examples during that meeting.

[95] NIWA says Ms Ashby contributed to the action giving rise to her dismissal by failing to take up an offer of counselling. I am not satisfied Ms Ashby's failure to engage in counselling contributed to NIWA's decision to terminate her employment.

[96] NIWA has invited me to also take into account as a contributing factor Ms Ashby's refusal to consider any option other than a move to the second shift. The difficulty with this submission is that NIWA did not provide any alternative options. NIWA itself failed to follow up the Psychologist's recommendation that Ms Ashby return to work while Master Solly was on his three month leave of absence.

[97] I have concluded Ms Ashby did not behave in a blameworthy or culpable way and there will be no reduction in remedies.

[98] NIWA Vessel Management Limited is ordered to pay to Ms Ashby an amount equivalent to three months lost wages from 15 December 2014 under s 123(1)(b) of the Act and the sum of \$20,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Costs

[99] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Ashby shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. NIWA shall have a further 14

days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[100] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority