

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 52  
5312529

BETWEEN

DAMIEN BURTTON  
Applicant

AND

TALLEY'S GROUP LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Anjela Sharma, Counsel for Applicant  
Gary Barkle, Counsel for Respondent

Investigation Meeting: Heard at Nelson  
8 December 2010  
9 December 2010  
10 December 2010  
13 December 2010  
14 December 2010  
28 January 2011

Submissions: 28 January 2011 Applicant's submissions  
28 January 2011 Respondent's submissions

Telephone conference: 2 May 2011

Additional information: 2 May 2011 Applicant's information  
2 May 2011 Respondent's information

Determination: 6 May 2011

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**DETERMINATION OF THE AUTHORITY**

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- A. Talley's Group Limited (Talley's) unjustifiably disadvantaged and unjustifiably dismissed Damien Burtton. Mr Burtton contributed to the situation which gave rise to his two personal grievances, so remedies have been reduced to reflect that.**

- B. Mr Burtton is awarded lost remuneration of \$35,697.10 and lost benefits, which are to be quantified. Talley's is ordered to pay Mr Burtton \$18,400 for humiliation, loss of dignity, and injury to feelings.**
- C. Talley's breached its good faith obligations under s4(1A)(c) of the Employment Relations Act 2000 ("the Act").**

### **Employment relationship problem**

[1] By consent, Mr Burtton's claims were heard at the same time as *Karl Browne v Talley's Group Limited*<sup>1</sup>. References to the law and facts in *Browne* also apply to this matter.

[2] I heard from fifteen witnesses who were all cross examined by opposing counsel, and I received nine affidavits by consent. In excess of 350 pages of documents were filed. The respondent's legal name is *Talley's*, not *Talleys*, so references in this determination to *Talley's* and *Talley's'* are not errors.

[3] All references to crew in this determination refer to crew who are employed by Talley's to work on *FV Amaltal Enterprise (The Enterprise)*, which is a deep sea fishing vessel which is at sea for 30-50 days per trip. Because of the type of working environment, and the nature of the allegations and evidence, some witnesses have been referred to by their initials only in order to preserve their privacy.

[4] Mr Burtton had been employed by Talley's as a Senior Sailor Deckhand on *The Enterprise* for six years prior to his dismissal. He worked under an individual employment agreement dated 1 October 2009 which incorporated Talley's standard Terms of Employment on Fishing Vessels dated 1 October 2009 (standard terms).

[5] Mr Burtton was indefinitely suspended without pay on 13 May 2010 and removed off *The Enterprise* (which had been due to depart on 14 May 2010 for a six week deep sea voyage). Mr Burtton remained suspended without pay until he was summarily dismissed by letter dated 25 June 2010.

[6] Mr Burtton raised two personal grievances; he claimed his dismissal was unjustified and that his suspension unjustifiably disadvantaged him in his employment.

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<sup>1</sup> [2011] NZERA Christchurch 51

Mr Burtton sought lost remuneration, lost of benefits, and compensation for hurt and humiliation and for injury to reputational.

[7] Mr Burtton alleged that Talley's had breached its s4(1A)(c) good faith obligations under the Act by failing to provide him with all relevant information about its concerns and by failing to give him an opportunity to comment on the information it had relevant to its decisions to suspend and dismiss him.

[8] Mr Burtton sought a \$5,000 penalty for the alleged breach of good faith, which he applied to have paid to him.

[9] Mr Hazlett, General Manager of Talley's Deep Sea Division accepted Mr Burtton's dismissal letter was poorly drafted because it did not clearly set out the findings he made on each of the four disciplinary allegations that had been put to Mr Burtton to respond to. The letter only addressed Mr Hazlett's belief Mr Burtton had been in possession of drugs and had been dishonest, which he said amounted to serious misconduct warranting summary dismissal.

[10] Talley's said it was justified in suspending Mr Burtton indefinitely without pay on 13 May 2010 because of responses he gave when interviewed on 13 May 2010. It said its actions in connection with his suspension were justified.

[11] Talley's said it complied with its good faith obligations because it gave Mr Burtton all of the information which impacted on Mr Hazlett's decision to dismiss him, except for the names of three people Talley's believed had provided information about Mr Burtton's alleged drug taking on *The Enterprise*.

### **Relevant facts**

[12] The background to Talley's' concern about drug use on *The Enterprise* and information about the drug dog search and indication is set out in *Browne*.<sup>2</sup>

[13] Because of the safety sensitive nature of its industry, Talley's had the contractual right to search its vessel, crew and their property.<sup>3</sup> This included the right to undertake drug dog searches. Crew consented to such searches in their individual employment

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<sup>2</sup> Ibid 1

<sup>3</sup> Standard terms – clause 31.1

agreements.<sup>4</sup> Talley's also has the contractual right to require crew to undergo drug testing.<sup>5</sup>

[14] Elite Dog Services Limited was engaged by Talley's to undertake two drug dog searches on *The Enterprise* in May 2010. The first search on 6 May 2010 resulted in the specialist drug dog *indicating on* (i.e. detecting the odour of drugs or the presence of drugs in such small quantities they could not be seen without a microscope) the clothes of LM, who admitted smoking cannabis at a pub the evening before whilst at a crew function.

[15] LM was interviewed by Rebecca Plum, Personnel Manager Talley's Deep Sea Division, on 6 May 2010 and her notes record LM disclosed;

- cannabis use by DH, TS, MJ, NW, and GL on the evening of 5 May 2010;
- that DT and CM were regular cannabis users;
- methamphetamine (also known as P) use by DT, JM, Mr Browne and Mr Burtton.

[16] LM denied he had been interviewed by Ms Plum and he said her notes were fabricated. I address this conflict later.

[17] The search on 12 May 2010 was conducted by Peter White, with specialist drug dog Max. Max indicated on the bags of six crew members; Mr Burtton, Mr Browne, JM, JH, DT, and MS.

[18] Mr Burtton was interviewed in his cabin by Mr White to determine if he knew why Max would have indicated on his bag. Mr Burtton said he did not know and mentioned his bag was new. Mr Burtton also offered to empty his pockets and take a drug test. After obtaining Mr Burtton's consent, Mr White conducted a thorough search which involved emptying the bag and closely examining its contents. No drugs or drug paraphernalia were found.

[19] Five of the six crew (Mr Burtton, Mr Browne, JM, DT and JH) Max had indicated on, accompanied Andy Smith, Operations Manager Talley's Deep Sea Division, and Lee Harding, Skipper of *The Enterprise* to the smoko room onshore and waited there until

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<sup>4</sup> Standard terms – clause 31.2 and IEA - clause 3.1

<sup>5</sup> Standard terms – clause 7.0

they were individually interviewed by Derek Milne. MS was not with this group because she was taken by Ms Plum to her office and interviewed there.

[20] Mr Milne is a licensed private investigator trading as Tasman Investigations Limited. Prior to starting Tasman Investigations Limited Mr Milne was employed by the NZ Police for 18 years, most of which was in the Criminal Investigation Bureau. Mr Smith engaged Mr Milne to investigate Talley's concerns about drug use on *The Enterprise*.

[21] The interviews with the five crew by Mr Milne were all held in Mr Smith's office. Whilst Mr Milne conducted his interview, Mr Milne and the crew member he was interviewing sat at a table about four metres away from Mr Smith's desk and computer. Mr Smith sat at his desk and worked on his computer. He said he could hear some of what was being discussed, but was not concentrating on the interviews.

[22] Mr Smith jotted some rough notes of what he had overheard, but he was not present as a note taker, and he accepted his notes are not a full record of what was discussed during Mr Milne's interviews. Mr Milne did not make any notes of his crew interviews on 12 May 2010, although he recorded who he had spoken to on a job sheet.

[23] Nothing of any consequence came out of Mr Milne's interviews with any of the crew. All denied drug possession or use and all denied knowing anything about drug use on *The Enterprise*. After the crew interviews Mr Burton, DT, and JH were allowed to return to the vessel. Mr Browne and JM were both taken to see Mr Hazlett, who indefinitely suspended them without pay.

[24] Mr Burton was away from work on the morning of 13 May 2010 because he was at the hospital supporting someone close to him through a sensitive and stressful medical procedure. Mr Milne and Mr Smith interviewed Mr Burton when he returned to the vessel that afternoon. They knew why Mr Burton had been away from work because he told them he had had a rough morning due to events at the hospital.

[25] There was a conflict between Mr Burton and Mr Smith and Mr Milne about exactly what was discussed, which I address later. It was not disputed Mr Milne asked to see Mr Burton's mobile phone, Mr Burton agree to show it to him, and the three of them went back to the vessel to get the phone from Mr Burton's cabin. There is another conflict over what occurred in connection with the mobile phone, but as a result of

Mr Milne's examination of Mr Burtton's phone Mr Smith indefinitely suspended Mr Burtton without pay and escorted him off the vessel.

[26] The only contact Mr Burtton had from Talley's whilst on unpaid suspension was on 16 June 2010 when he received a disciplinary letter dated 11 June 2010 which scheduled a disciplinary meeting at 11am on Friday 18 June 2010. The letter listed four allegations of misconduct but did not provide any details of the allegations or information in support of them.

[27] Mr Burtton approached Ms Plum twice whilst suspended to find out what was happening with his case, but she told him she was not involved so could not tell him anything. Mr Burtton's suspension was not reviewed and he was suspended without pay for almost six weeks; from 13 May until 25 June 2010.

[28] Mr Burtton instructed Ms Sharma to represent him and on 16 June 2010 she asked for further detail about the allegations against him. Ms Sharma followed up her request on 16, 17 and 18 June 2010. Late on the afternoon of 18 June 2010 Ms Plum emailed Ms Sharma a summary of the information Talley's was relying on in support of each allegation together with a copy of Mr White's report dated 12 May 2010, which had names redacted. No further information was provided.

[29] Mr Burtton's disciplinary meeting was held on 23 June 2010 and he was summarily dismissed by letter dated 25 June 2010.

### **Conflicts of evidence**

[30] This case involved a number of key evidential conflicts. The Authority's task in resolving conflicts of evidence is to objectively determine on the balance of probabilities what is likely to have occurred.

#### *LM's alleged disclosure of drug use*

[31] Talley's said LM disclosed to Ms Plum when they met on 6 May 2010 that he had seen Mr Burtton use P on the vessel. LM denied meeting with Ms Plum and he denied he had witnessed or disclosed drug use by Mr Burtton, or for that matter any other crew. LM said Ms Plum's notes and evidence were fabricated.

[32] For the reasons set out in *Browne*<sup>6</sup> I consider it likely Ms Plum met with LM on 6 May 2010 and that her notes record her understanding of what LM told her. This included his disclosure of cannabis by DH, TS, MJ, NW, GL, DT and CM and P use by DT, JM, Mr Browne and Mr Burtton.

*Presence of Mr Smith on 12 May 2010*

[33] Mr Burtton said Mr Smith was not present when Mr Milne interviewed him on 12 May 2010. Mr Smith thought he was there, although he admitted he had *a very bad memory*.

[34] I find Mr Smith was probably not present when Mr Milne was questioning Mr Burtton because he could not recall what had been discussed. Also whilst Mr Smith had made notes about the interviews with the four other crew, he only recorded *Damien: Dog indicated. Let go*, which suggested he was not present during Mr Burtton's interview.

*The "threatening phone call" allegation*

[35] Talley's alleged Mr Burtton made a threatening phone call to two other suspended crew; Mr Browne and JM. The allegation was based on Talley's interpretation of information from CB, the mother of JM's girlfriend, N.

[36] CB made numerous calls to Talley's during which she variously spoke to Peter Talley, Mr Hazlett, Mr Smith, and Ms Plum. No record was made of these calls and no notes were taken so it was unclear what sequence the calls took or what was discussed when and with whom.

[37] I consider it likely CB's first call was to Peter Talley around 8pm on 12 May 2010. Mr Talley then called Mr Smith, who in turn called CB around 8.15pm that night. I consider it likely CB called Ms Plum and Mr Hazlett on the morning of 13 May 2010 and then followed those calls with an unspecified number of additional calls to Mr Smith, Ms Plum and Mr Hazlett.

[38] Talley's said CB reported Mr Burtton had made a threatening phone call to JM and Mr Brown on the afternoon of 12 May 2010 which she had overheard when she picked JM and Mr Browne up and that the call made her scared for JM's safety.

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<sup>6</sup> Ibid 1

[39] CB denied this. She said she did not pick Mr Burtton and JM up. She said she was never in the car with them. She said she could not have overheard Mr Burtton's phone call because she was still at work when it was made. She said she did not consider Mr Burtton's call threatening and she was not scared for JM's safety, so she would not have said that.

[40] At the time of CB's calls to Talley's N and JM were living together. Mr Browne stayed with JM and N for the first week of his suspension (12-19 May 2010) because he had nowhere else to stay in Nelson. JM and Mr Browne were suspended together and N and her friend (name unknown) collected them and drove them back to JM's and N's flat.

[41] Whilst on her way home from work on 12 May 2010 CB visited N shortly after N had returned home with JM and Mr Browne. CB went back to her house and N, JM, and Mr Browne visited her later that evening. Whilst they were at her house CB called Peter Talley, one of Talley's directors, to see if he could get JM back to work. Mr Talley called Mr Smith and told him to call Ms Bellamy, which Mr Smith did.

[42] It was agreed CB told Talley's witnesses it was unfair JM had been suspended when other crew had not. She suggested Max could have been interested in JM's bag because it had contained opiates which had been prescribed to N, who was gravely ill. CB also provided details of N's illness and discussed the need for N to avoid stress due to her health issues.

[43] JM financially supported N because her ill health meant she could not work so his indefinite unpaid suspension put N under considerable additional stress when stress was detrimental to her medical condition. Talley's witnesses agreed CB was very concerned about the impact JM's suspension was having on N's ill health and that her calls were about getting JM back to work.

[44] CB said Mr Burtton's call to Mr Browne came up when she was asked by Mr Smith on the evening of 12 May 2010 how she knew other crew had been allowed back on the vessel. CB said she told him Mr Burtton had told Mr Browne and JM about the other crew when he called them that afternoon.

[45] Mr Smith said CB told him *Mr Burtton had told JM not to drop him in it*. CB denied she said that.

[46] I consider Mr Smith's account of what CB said about what Mr Burtton allegedly said in his phone call to Mr Browne was inherently unreliable. Even if CB said what has been attributed to her, by the time it reached Mr Smith on the best possible interpretation what Mr Burtton allegedly said was at least quadruple hearsay. It could well have been even more removed than that.

[47] Mr Smith admitted CB did not describe Mr Burtton's call as threatening; she did not say Mr Burtton had made a threat; and she did not say she was concerned for JM's safety. Mr Smith admitted he had assumed the threat and safety concerns from the comment *Mr Burtton had told JM not to drop him in it*.

[48] Ms Plum agreed CB had never told her Mr Burtton's call was threatening or that she was concerned for JM's safety. Ms Plum had implied the threat and concern, but without asking CB any questions to establish whether her impression was correct.

[49] Mr Smith and Ms Plum admit discussing their calls with CB with each other and with Mr Hazlett. I consider these discussions have coloured (however unwittingly) their perceptions and recall of their conversations with CB. I consider their evidence is more likely to be a reconstruction of what they think was said based on input and discussions over time with others than an accurate recall of what CB actually said to each of them during their individual phone calls, because they make the same incorrect inferences and their verbal evidence diverted from their written statements on identical matters.

[50] Their statements both said CB had told them she had picked JM and Mr Browne up, but when questioned they each admitted she had not actually said that, they had just inferred it. Their inferences were incorrect because CB was still at work when the call was made. Their statements both said CB told them she had overheard the call, but when questioned they each admitted she had not actually said that, they had each assumed it. CB could not have overheard the call because she was not in the car. Their statements said CB said she was concerned about JM's safety, but when questioned they each admitted CB had not actually said that, they had both inferred it.

[51] When giving evidence Mr Smith told me he had *a terrible memory* and his recollection was clearly wrong in key respects, which called into question the accuracy of the comments he attributed to CB. I consider it likely Mr Smith's view of CB's calls coloured Ms Plum's recall of her discussions with CB.

[52] I consider CB was a relatively independent witness who had no reason to be untruthful. She had never met Mr Burtton and had only met Mr Browne very briefly when he stayed with N and JM during the first week of his suspension. Since 19 May 2010 Mr Browne has been based in Auckland.

[53] Whilst CB had a close connection to JM, Talley's ultimately let JM return to work. JM remains employed and he has not pursued any claims against Talley's. The relationship between N and JM also ended before CB provided her witness statement.

[54] I have resolved this conflict in favour of CB's evidence on the basis it is more likely to be correct than Mr Smith's and Ms Plum's recollection. I consider CB did refer to Mr Burtton's call to Mr Browne, but she did so in passing, within the context of explaining how she knew other crew had not been suspended.

[55] I find CB did not tell Talley's she had picked JM and Mr Burtton up; or that she had overheard Mr Burtton's call; or that she considered Mr Burtton's call threatening; or that she was scared about JM's safety.

*Call to Karl Browne on 12 May 2010*

[56] Mr Burtton admitted making a call to Mr Browne at 16.57pm on 12 May 2010, but there is a conflict over how Mr Burtton made that admission.

[57] Mr Milne and Mr Smith re-interviewed Mr Burtton on the afternoon of 13 May 2010. They said he was asked twice whether he had called Mr Browne the previous day and he twice denied doing so. They said Mr Burtton only admitted making the call when he was told that Talley's knew he had called Mr Browne.

[58] Mr Milne said Mr Burtton asked whether they had tapped his phone and then admitted he had called Mr Browne around 4.30pm when he was on his way to JM's house. Mr Milne said Mr Burtton apologised for lying and when asked why he had lied, he could not say.

[59] Mr Browne's evidence was he was only asked once if he had called Mr Browne. He said at first he answered no as he had genuinely forgotten he had made a brief call to Mr Browne the day before but then corrected himself and said *actually no, I had spoken to him the day before*. Mr Browne said he attributed his brief memory lapse to his particularly stressful morning at the hospital, and he said he told Mr Milne that.

[60] Mr Smith's and Mr Milne's evidence about what had occurred was consistent and supported by a documentary record. Mr Smith's notes record Mr Burtton *apologies for not telling truth* and Mr Milne's report states:

*I asked him if he had been in touch with Karl Browne or [JM] since they were suspended and he said he hadn't. I asked him again and he said he had not. [...]*

*I told him I knew he had been in touch with Mr Browne and he then changed his demeanour and admitted he had been in touch with Browne and apologised.*

*He could not say why he had denied speaking to him.*

*[...]*

*He apologised again for not telling the truth [...]*

[61] If Mr Burtton's call to Mr Browne had just slipped his mind and he had immediately corrected himself it was unlikely he would have asked if his phone was tapped and unlikely he would have apologised twice for not telling the truth. I therefore consider on the balance of probabilities it was likely Mr Burtton was asked twice if he had called Mr Browne and twice denied doing so.

#### *Karl Crackie allegation*

[62] Talley's said Mr Burtton had stored Mr Browne's name in his phone as *Karl Crackie*. Mr Burtton denied that and said he stored Mr Browne's name in his phone as *Karl Crack Up*.

[63] Mr Milne said when he saw how Mr Browne's name had been stored, he asked Mr Burtton why he had Mr Browne listed as Karl Crackie and Mr Burton told him *because Karl used to use P*. Mr Milne recorded that in his report dated 24 May 2010.

[64] Mr Smith's evidence and evidence from *The Enterprise Skipper*, Lee Harding corroborated Mr Milne's account of this issue.

[65] Mr Harding's affidavit stated he recalled Mr Milne asking Mr Burtton why Mr Browne's name was stored in his phone as *Karl Crackie* and he said Mr Burtton replied *because Karl used to use it*. Mr Harding stated he was in the doorway of Mr Burtton's cabin so heard this exchange.

[66] Mr Burtton said when asked about Mr Browne's name in his phone, he told Mr Milne when he put Mr Browne's name into his contacts he did not know his last name, so called him *Karl Crack Up* to distinguish him from another Karl he had listed in his contacts.

[67] I consider Mr Milne's account is more likely to be correct, so I find it was likely Mr Burtton had stored Mr Browne's name in his contacts as Karl Crackie.

### **Issues**

[68] The issues to be determined include:

- (i) Was Mr Burtton's suspension justified?
- (ii) Was Mr Burtton's dismissal justified?
- (iii) If Mr Burtton has personal grievance claims what (if any) remedies should be awarded?

### **Was Mr Burtton's suspension justified?**

[69] Whether Talley's actions in suspending Mr Burtton, and how it acted in connection with his suspension, were justified is to be objectively determined in light of the s103A justification test under the Act. An employer's compliance with its contractual and good faith obligations are relevant factors when assessing justification.<sup>7</sup>

[70] Although Talley's had the contractual right to *suspend an employee without pay while investigating and processing any complaint of misconduct*<sup>8</sup> it still had to have a good reason for doing so and it was required to follow a fair process, which included complying with its contractual and good faith obligations.

[71] Under the Act, the duty of good faith is wider than the implied mutual obligations of trust and confidence.<sup>9</sup> It requires parties to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other

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<sup>7</sup> *X v ADHB* [2007] ERNZ 66

<sup>8</sup> Standard terms – clause 28.3

<sup>9</sup> Section 4(1A)(a) ERA

things, responsive and communicative.<sup>10</sup> This applies to an employer contemplating suspension of an employee.<sup>11</sup>

[72] An employer which is making a decision that may impact on an employee's ongoing employment is required to give that employee access to information relevant to its decision, and an opportunity to comment on it, before a final decision is made.<sup>12</sup>

[73] An employer contemplating suspending an employee against whom serious misconduct has been alleged, will normally be required to tell the employee of the possibility of suspension, explain the grounds for the proposed suspension, and offer the employee an opportunity to persuade them not to suspend. It will be relatively rare for an employer to be justified in unilaterally suspending without advice to, or input from, the affected employee.<sup>13</sup>

[74] I do not consider there are any features of this case which would justify a departure from the normal principles of natural justice applying.

[75] Mr Smith indefinitely suspended Mr Burtton without pay on 13 May 2010. Mr Burtton remained suspended without pay until he was dismissed on 25 June 2010. Apart from sending him a disciplinary letter, Talley's had no contact with Mr Burtton while he was suspended. Nor did Talley's respond to Mr Burtton's two requests for information about his situation.

[76] Mr Smith said his reason for suspending Mr Burtton was because he believed Mr Burtton had lied in response to questions from Mr Milne and had attempted to cover up his association with Mr Browne. I find these were not good reasons for indefinitely suspending Mr Burtton without pay, which I consider was a draconian measure.

[77] In terms of process, Mr Smith told Mr Burtton while they were in his cabin he would not be sailing. Mr Smith then went onshore and got a suspension letter off Ms Plum which he glanced at before handing to Mr Burtton. Ms Plum used Talley's standard suspension template letter which recorded the suspension was without pay. Mr Smith said did not notice that before he handed the letter to Mr Burtton.

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<sup>10</sup> Section 4(1A)(b) ERA

<sup>11</sup> *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178

<sup>12</sup> Section 4(1A)(c) ERA

<sup>13</sup> *Ibid* 11

[78] Mr Smith said he never considered whether Mr Burtton should be suspended with or without pay and he did not discuss that with Mr Burtton. Mr Smith said he never thought about how long Mr Burtton should be suspended for, so he did not discuss that with him either.

[79] Mr Smith did not give Mr Burtton any information before he suspended him and he did not give Mr Burtton an opportunity to comment on the information he had before he suspended him, in breach of the good faith obligations in s.4(1A)(c) of the Act.

[80] Mr Smith did not explain to Mr Burtton why he was proposing an unpaid indefinite suspension and he did not give Mr Burtton an opportunity to convince him why that should not occur. He did not advise Mr Burtton the suspension would be unpaid or how long it would be for. Mr Smith did not consider any options other than suspension and he did not give Mr Burtton an opportunity to obtain representation before the final decision was made to indefinitely suspend him without pay.

[81] Talley's engaged Mr Milne on 12 May 2010 to investigate its concerns about drug use on *The Enterprise*. Mr Milne had finished his investigation by 19 May 2010 and provided a report dated 24 May 2010. I am not satisfied Talley's had a good reason for suspending Mr Burtton without pay for six weeks.

[82] Talley's failure to communicate with Mr Burtton during his unpaid suspension or to respond to his requests for information was not the actions of a fair and reasonable employer.

[83] I find that Mr Burtton's indefinite unpaid suspension was procedurally and substantively unjustified. Talley's affected Mr Burtton's employment, or one or more terms of it, to his disadvantage by unjustifiable action.

#### **Was Mr Burtton's dismissal justified?**

[84] Talley's bears the onus of justifying Mr Burtton's dismissal which is to be objectively assessed in accordance with the justification test in s103A of the Act.

[85] The Authority is required to determine whether Talley's conducted a full and fair inquiry into its concerns, and whether as a result of those inquiries Mr Hazlett had

reasonable grounds to believe, and did honestly believe, Mr Browne had engaged in misconduct sufficiently serious to warrant dismissal.<sup>14</sup>

[86] When reviewing whether Talley's had reasonable grounds to believe serious misconduct warranting summary dismissal had occurred, the focus is on all of Talley's actions and how it acted at each stage of its process. The Authority must be satisfied Talley's adopted a logical chain of reasoning, which is transparent and reasonable from the facts uncovered during its investigation and presented to it.<sup>15</sup>

[87] In order to establish reasonable grounds for its belief serious misconduct had occurred, Talley's must either have had clear evidence upon which a reasonable employer would have concluded serious misconduct had occurred, or it must have carried out reasonable inquiries which established on the balance of probabilities reasonable grounds for believing Mr Burton had engaged in serious misconduct, and it must have believed he had done so.<sup>16</sup>

[88] Failure by an employer to comply with its contractual terms and policies/procedures or with its statutory good faith obligations are factors which impact on an assessment of justification.<sup>17</sup>

[89] Because the *possession or use of drugs* allegation effectively amounted to serious criminal offending, the evidence in support of it as providing justification for dismissal needed to be as convincing as the charge was grave.<sup>18</sup>

#### *Breach of contract*

[90] Talley's standard terms stated [...] *the employer will advise the employee of the allegation and all information it has relating to that allegation [...]*.<sup>19</sup> Talley's were in breach of contract because they did not provide Mr Burton with all information the decision maker had about the allegations against him.

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<sup>14</sup> *C v Air NZ Ltd* [2011] NZEMPC 27

<sup>15</sup> *Ibid* 14

<sup>16</sup> *Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* [2006] ERNZ 415

<sup>17</sup> *Ibid* 7

<sup>18</sup> *Honda NZ Ltd v. NZ (With exceptions) Shipwrights etc Union* [1990] 3 NZILR 23.

<sup>19</sup> Standard terms – clause 29.1.1

*Breach of good faith*

[91] Mr Hazlett had the following information relevant to his consideration of Mr Burtton's ongoing employment which was not disclosed to Mr Burtton:

- Verbal report from Ms Plum that JS had disclosed drug use at sea by Mr Burtton and that he *was giving the younger girls on the boat P to get in their pants*;
- Verbal report from Ms Plum that AM had overheard drug related conversations by young female crew;
- Ms Plum's notes of her interview with LM on 6 May 2010, recording LM's disclosure that Mr Burtton was someone who used P at sea;
- Verbal report from Ms Plum that BP and her partner ND believed Mr Burtton was getting his girlfriend KP (who was also ND's daughter) into drugs;
- Verbal report from Ms Plum that KD was concerned KP was getting mixed up in drugs;
- His view of the relevance of the drug dog's indication on Mr Burtton's bag;
- Mr White's report dated 12 May 2010;
- Mr Milne's adverse view of Mr Burtton from his interview on 12 May 2010;
- Verbal advice that Mr Smith and Mr Milne believed Mr Burtton had repeatedly lied during his interview on 13 May 2010;
- Mr Smith's verbal report of Mr Milne's interview with Mr Burtton on 13 May 2010;
- Mr Smith's verbal report CB had disclosed Mr Burtton had made a threatening call to Mr Browne and JM on 12 May 2010.

- Ms Plum's verbal report that she had seen Mr Burtton in the supermarket in the second week of his suspension and from his demeanour she believed he was on P;
- His interview with BP (date and content unknown);
- His interview with JS who apparently confirmed he believed drugs were being used on *The Enterprise*;
- Mr Milne's report dated 24 May 2010;
- His discussion with Mr White (date unknown) about the search;
- Notes of LM's disciplinary meeting;
- Notes of Mr Browne's disciplinary meeting;
- His interviews (dates and content unknown) with Lee Dodunski, Eru Puata and possibly other crew whose names he cannot recall;
- Mr Smith's verbal report of the interview of Mr Burtton by Mr Milne on 13 May 2010.

[92] Talley's breached its statutory s4(1A)(c) duty of good faith under the Act to Mr Burtton because it did not give him any of this information so he had no opportunity to comment on it before he was dismissed.

*Disciplinary allegations and information*

[93] Talley's alleged Mr Burtton had breached clauses 7 (drugs and alcohol testing) and 30.1 (search consent) of its standard terms but did not identify how. I consider the initial disciplinary allegations put to Mr Burtton in Talley's letter dated 11 June 2010 were so vague they were basically meaningless.

[94] In response to Mr Burtton's request for more information Talley's summarised the information it was relying on in support of each disciplinary allegation and provided him with a summary of some of the information it had.

[95] Set out below is all of the information Mr Burtton was given before his disciplinary meeting with the disciplinary allegations marked in bold:

- **Possession or use of drugs** – On the 12th May a drug dog indicated the presence of narcotics on Damien’s bags.
- [Blacked out] told us that he knew Damien was using P and it was well known on the vessel that Damien was supplying it to young female crew members.
- [Blacked out] told us they had witnessed Damien using P on the vessel and he had seen him under the influence while at sea.
- **Dishonesty** – When spoken to by Andy Smith and Derek Milne on the 13th of May Damien stated that he only knew Karl Browne ‘from the boat’ and had first met him a year ago. Karl has told us that is not true that in fact he has known Damien for at least four years, and originally met him in Auckland.
- In the same meeting with Andy and Derek Damien also lied about phoning Karl Browne on the evening of 12th of May. Damien denied doing so. He eventually told the truth, and also went as far as showing Andy and Derek his cellphone which showed the call he made to Karl at 16:47 on May 12 2010.
- **Detection or knowledge of drugs/substance abuse and not reporting** – In Damien’s contacts on his cellphone he referred to Karl Browne as ‘Karl Crackie Browne’. When asked for an explanation Damien said it was because ‘Karl smoked crack’. Damien obviously was aware of Karl’s drug use, but chose not to report the problem.
- **Unsatisfactory or antisocial and/or threatening behaviour** – [Blacked out] overheard the phone call between Damien Burton and Karl Browne at 16:47 on the 12th of May. We have been told Damien threatened both Karl and Jamie Meredith during that phone call, and told them not to repeat what they knew about Damien’s involvement with the drug use on the vessel.

[96] Talley’s did not accurately summarise the information it had, specifically:

- (i) **Possession or use of drugs** – The first blacked out name was JS, so this information came from his informal discussions with Ms Plum, which she had treated as unsubstantiated gossip and rumours. Mr Hazlett told me he never believed the supply allegation which he considered was unsubstantiated gossip. Despite this, Talley’s presented JS’s alleged information as if it were a direct disclosure, when it clearly was not.

JS provided an affidavit which denied he had ever named Mr Burton as a P user and which said his reference to *supplying [P] to young girls* had nothing to do with Mr Burton, but referred to rumours about crew on an entirely different boat. If he had been properly questioned about his alleged disclosure, Talley’s would have known that.

Talley's simply did not have the information it said it had in support of this allegation. Talley's failure to provide accurate information resulted in the media linking Mr Burtton to the supply of P to young female crew in publicity arising from his interim reinstatement application and subsequent challenge. This was extremely unfair to him because not only was it unreliable gossip, it was also gossip that had nothing to do with Mr Burtton, and which had nothing to do with *The Enterprise*.

- (ii) The second blacked out name was LM, and this information was based on Ms Plum's notes of her interview with LM on 6 May 2010. LM had not directly said he had witnessed Mr Burtton using P on the vessel, he had just named Mr Burtton in response to questions Ms Plum had asked about P. Talley's never alleged LM had said he had seen Mr Burtton under the influence while at sea, so what Talley's disclosed to Mr Burtton about that was clearly untrue.
- (iii) *Dishonesty* – This information was based on answers Mr Browne gave to questions he was asked during his disciplinary meeting but it misrepresented what Mr Browne said. Mr Browne never said Mr Burtton's information was untrue and he did not actually say he had known Mr Burtton for four years. The information provided was Talley's words and interpretation, but it did not fairly or accurately record what Mr Browne had actually said.
- (iv) The reference to Mr Burtton's call to Mr Browne does not explain why Talley's believed he had lied as opposed to him having been mistaken or forgetful. Nor does it set out what information Talley's was relying on in support of this allegation.
- (v) *Unsatisfactory or antisocial and/or threatening behaviour* – This referred to CB's phone call to Mr Smith on 12 May 2010. Even on Talley's view of this issue (which I have already found was unreliable) there was never any allegation Mr Burtton had told Mr Browne and JM not to repeat what they knew about his involvement with drug use on board. I can only conclude that comment is something Talley's just made up, because it cannot be attributed to any of the many witnesses I heard from. This is therefore another serious misrepresentation of the information Talley's was relying on.

*Defective investigation*

[97] Talley's was an employer with considerable resources at its disposal and it had engaged a private investigator to investigate its concerns about drug use on *The Enterprise*. Despite that, Talley's still failed to conduct a full or fair investigation.

[98] I find Talley's investigation was seriously deficient and defective from the outset. The process Talley's adopted was so fundamentally flawed Mr Hazlett's belief serious misconduct had occurred was not a reasonable belief.

*Failure to make proper inquiries*

[99] Talley's failed to make proper inquiries into its concerns. Instead Mr Hazlett was influenced by unsubstantiated and highly prejudicial rumours, gossip and unreliable hearsay. As the decision maker it was Mr Hazlett's responsibility to ensure the concerns had been fairly and properly investigated, but he did nothing to establish that. He was verbally drip fed a huge amount of prejudicial hearsay information, which he made no notes about, and which he never put to Mr Burton to respond to.

[100] Mr Hazlett met with LM, BP, and JS who were all individuals Talley's believed had provided information about Mr Burton's alleged P use, but he did not ask any of them what they knew or how they knew it. This was a serious error because he had no reliable direct account of what they had allegedly disclosed.

[101] Ms Plum reported to Mr Hazlett triple hearsay information that AM and KD had expressed concern about drug use on *The Enterprise*, but they were never spoken to so Talley's had no direct or reliable information about what they knew and how they knew it.

[102] Mr Hazlett had a number of telephone conversations with CB, but did not ask her anything about Mr Burton's call. It should have been obvious the information about this call was at least fifth hand hearsay by the time it got to Mr Hazlett, and it was quite possibly even more removed from that. Steps should have been taken to confirm or clarify what information CB had and how she knew it.

[103] If Mr Hazlett had made any inquiries of Mr Smith or Ms Plum he could have found out CB had never said Mr Burton's call was threatening and had never said she was scared for JM's safety. He could have established the alleged threat and concern

were assumptions made by Mr Smith and Ms Plum, instead of uncritically treating their information as if it were true.

*No assessment of LM's credibility*

[104] Ms Plum's notes of her interview with LM on 6 May 2010 recorded LM disclosed cannabis use by crew DH, TS, MJ, NW and GL and P use at sea by Mr Burton, Mr Browne, JM and DT. A fair and reasonable employer would have carefully assessed LM's credibility before relying on his disclosures, but there was no evidence Mr Hazlett did so.

[105] Talley's did not do anything to determine whether LM's cannabis use disclosures were truthful. It never interviewed the crew he named nor did it drug test them as it was contractually entitled to do.<sup>20</sup> LM's credibility regarding his cannabis disclosures was a factor that should have been considered when assessing the reliability of his P use disclosures.

[106] There was no evidence Mr Hazlett considered what weight should be given to LM's disclosures. These had been made whilst LM was being interviewed about his own drug use and Ms Plum's notes stated LM *said he's very afraid of losing his job, and would be willing to do whatever it took to keep it*. That comment should have been, but was not, taken into account by Mr Hazlett when he should have been assessing LM's credibility.

[107] Mr Hazlett said he believed LM's disclosures of P use by Mr Burton and Mr Browne but disbelieved LM's disclosures of P use by DT and JM, but he could not explain why. Mr Hazlett was unable to satisfy me he had good reasons for finding LM credible in some respects but not others.

[108] It would have been clear to Mr Hazlett from Ms Plum's notes that LM's disclosure about Mr Burton was extremely vague. LM had not provided times, dates, locations, occasions, or the circumstances when he alleged Mr Burton had used P, and there was no information about how LM had knowledge of Mr Burton's alleged P use. These obvious lines of inquiry were never pursued and LM was not asked even basic questions about his disclosures.

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<sup>20</sup> Standard terms – clause 7

[109] Talley's failure to clarify LM's disclosures or to obtain any specific details from him meant it was not in a position to properly assess credibility issues.

*Refusal to drug test Mr Burton*

[110] Mr Burton asked to be drug tested twice; first when Mr White spoke to him in his cabin and again during his disciplinary meeting. Mr Burton told Talley's he had not, and did not, use drugs and drug testing would prove that.

[111] Mr Hazlett said he declined to drug test Mr Burton because he believed the results of drug testing could be masked and P left an individual's system so quickly there was no point testing for it. I find Mr Hazlett rejected Mr Burton's requests to be drug tested without properly considering them. He made assumptions which were not backed up by information and which were not supported by any inquiries he had made.

[112] Talley's was a company which was in the habit of drug testing employees for cause. It also regularly undertook random drug testing of crew. Prior to May 2010 Mr Burton had been randomly drug tested twice and had passed both tests. LM was drug tested via a urine sample on 18 June 2010 and JM was drug tested for P via a hair sample on 28 June 2010. In light of this, Talley's reasons for not drug testing Mr Burton do not ring true.

[113] Ms Plum told Mr Hazlett she *had seen Mr Burton in the supermarket and she believed from his demeanour he was on P* but he was still not drug tested, which would have determined whether Ms Plum was correct or not. Mr Hazlett had no explanation for not drug testing Mr Burton after Ms Plum's disclosure and he admitted in hindsight that should have occurred.

[114] Where an employee who has been accused of drug use is denying it and asking to be drug tested, a fair and reasonable employer would consider that request and would only deny it if it had good reason based on reasonable grounds for refusing to drug test the employee. Mr Hazlett did not satisfy me he had good reason based on reasonable grounds for declining Mr Burton's requests to be drug tested.

*Failure to keep accurate records*

[115] A fair and reasonable employer would have ensured there was an accurate record of its investigation and of the information it had obtained. This would have involved

taking notes of the interviews it conducted and of the meetings it had so that the employee knew who the employer had spoken to, the questions witnesses were asked, and what each witness had said.

[116] Ms Plum did not make a record of the disclosures she said JS, AM, and KD made to her about drug use in late 2009 and April 2010. Ms Plum did not make a note of the drug related concerns BP had told her she and ND had about Mr Burton. Ms Plum did not make notes of any of her telephone conversations with CB.

[117] Mr Hazlett did not record his interviews with BP, JS, Lee Dodunski, Eru Puata or of his telephone call(s) with CB. Mr Hazlett thought he may have spoken to some other crew, but he was not sure who or when or what was said. Mr Hazlett spoke to Mr White about the search some time after 12 May 2010, but there was no record made of that.

[118] Mr White did not make notes of the discussions he had on 12 May 2010 with the crew in their cabins and he did not record what property and body searches he had conducted.

[119] Mr Milne did not take notes of his interviews with crew on 12 May 2010 so he did not have any notes of his interview with Mr Burton. Mr Milne's report dated 24 May 2010 was based on his recall of the interviews he had conducted on 12 May 2010.

[120] Mr Burton had no way of knowing who Talley's had spoken to, when they had been interviewed and by who, or what those people had said. Mr Burton was not provided with Ms Plum's notes of her interview with LM or with the notes of LM's or Mr Browne's disciplinary meetings, despite these being relevant to the allegations against him.

*Decision maker influenced by unreliable and highly prejudicial information*

[121] I consider Mr Hazlett was influenced by highly prejudicial information which was not shared with Mr Burton, who therefore had no opportunity to challenge the reliability of the information. I do not accept Mr Hazlett put this information out of his mind and that it had no influence on his decision. The prejudicial information included:

(i) JS disclosures

[122] Ms Plum relayed double hearsay to Mr Hazlett that JS had named Mr Burtton as a drug user and had been *giving the younger girls P to get in to their pants*. JS denied making these disclosures and his affidavit set out the information he had given Ms Plum.

[123] JS said the allegation involving young girls was nothing to do with Mr Burtton but involved rumours about crew on a different vessel. JS also said he had no personal knowledge of drug use on *The Enterprise*, he had just heard rumours and gossip. Mr Hazlett would have discovered that if he had asked JS about his alleged disclosure.

(ii) BP concerns

[124] Rebecca Plum passed quadruple hearsay to Mr Hazlett about what BP had said her partner ND had said about his daughter KP, who was Mr Burtton's girlfriend. All these people were employed by Talley's at this time this information was provided. BP was related to one of the participants in Mr Burtton's disciplinary meeting. I consider the work, personal and family relationships involved between these people were likely to have had a particular impact on Mr Hazlett, which made their hearsay information highly prejudicial.

(iii) AM and KD information

[125] Ms Plum passed triple hearsay information to Mr Hazlett about AM's and KD's concerns about drug use on *The Enterprise*. AM and KD are crew which I consider would have influenced Mr Hazlett's view that drugs were being used on the vessel.

(iv) LM disclosures

[126] Because of the hearsay evidence Ms Plum reported to him, Mr Hazlett believed LM had witnessed Mr Burtton using P at sea. I find that was not a reasonable belief based on the information available.

(v) Supermarket incident

[127] Ms Plum told Mr Hazlett she had seen Mr Burtton at the supermarket on P in the second week of his suspension and that she was *quite concerned for her safety*. Mr Hazlett thought highly of Ms Plum and he had believed the unreliable hearsay

information she had been passing to him, which meant her views were likely to have been highly prejudicial.

[128] Mr Hazlett said this did not form part of his thinking on the disciplinary allegations but I am not convinced he would have been able to put such highly prejudicial information out of his mind completely. Ms Plum and Mr Hazlett worked closely together and he clearly trusted her. Mr Hazlett did not provide any explanation as to why he did not accept what Ms Plum had told him about this incident when he had previously demonstrated he was quite prepared to uncritically take her word about various matters, even when the information she conveyed raised obvious unanswered questions.

[129] Talley's never investigated Ms Plum's disclosure so Mr Burtton only became aware of it was when he read Ms Plum's witness statement. When Ms Plum saw Mr Burtton in the supermarket he was with KP, and Mr Burtton and KP both strongly denied he was on P or any other drugs.

(vi) "Threatening call" allegation

[130] Mr Hazlett believed the quadruple (or even more removed) hearsay evidence that Mr Burtton had made a threatening call, when there was no reasonable basis for him to do so. The entire *threat* had been inferred by Mr Smith and Ms Plum.

(vii) Association between Mr Burtton and Mr Browne

[131] Mr Hazlett believed Mr Burtton and Mr Browne had tried to deny or minimise their knowledge of each other which he concluded meant they had something to cover up which in turn lead him to conclude there was something untoward about their association.

[132] If Mr Hazlett had been clear about what he was asking Mr Browne and why, he would have got Mr Browne's explanation for the reasons he had lead Talley's to believe he had known Mr Burtton for four years whilst Mr Burtton had said they only met on *The Enterprise*. That was clearly relevant to his assessment of whether Mr Burtton had been dishonest, so he should have had that information, but took no steps to obtain it.

[133] When asked what evidence he had in support of the view that Mr Burton and Mr Browne had some untoward association, Mr Hazlett said *I can't point to a specific piece of evidence, I just don't see the reason for Mr Burtton to lie about how long he knew Mr Browne*. Mr Hazlett said he believed Mr Burtton and Mr Browne had a lot more to do

with each other off the vessel and that during those times they were involved in drugs. No steps were taken to investigate that belief. This was an unfair and unreasonable conclusion for Mr Hazlett to draw without having first made proper inquiries into their association. It was also highly prejudicial.

[134] Mr Hazlett never put his views to either Mr Burton or Mr Browne to respond to, so they were deprived of a fair opportunity to dissuade Mr Hazlett of his assumptions. This was a fundamental breach of fairness. As stated by the Employment Court in *X v ADHB*<sup>21</sup>:

*In addition to the longstanding statutory requirements for responsiveness and communicativeness in s4(1A) of the Act, longstanding requirements of fair dealing require significant conclusions, including tentative ones, to be articulated to the employee.*

#### *Predetermination*

[135] Mr Hazlett did not approach the disciplinary allegations against Mr Burton with an open mind. When asked why he did not ask LM any questions about his disclosure about Mr Burton, Mr Hazlett said that once the dog had indicated on the bags of crew, he took the content of Ms Plum's notes as being true.

[136] Despite not making any inquiries to determine what LM knew about Mr Burton's alleged drug use at sea and how he knew it, and despite failing to obtain any specific information about Mr Burton's alleged drug use at sea, Mr Hazlett told me he believed Mr Burton had used drugs at sea. I find that view was unreasonable based on the evidence available to him.

[137] Ms Plum gave Mr Hazlett highly prejudicial hearsay information which she said had come from JS. Despite interviewing JS, Mr Hazlett did not ask him anything about his alleged disclosures which suggested he had just accepted the hearsay as being true. Talley's relied on JS's information even though it never asked him to explain what he knew about drug use on the vessel or how he knew about it. This indicated a closed mind.

[138] Mr Hazlett told me *it was very clear in my mind she [CB] told Mr Smith there had been threatening behaviour and she was very worried*. When asked what the threat was, Mr Hazlett said *non specific, I didn't have that conversation, it was just implied*. I

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<sup>21</sup> Ibid 7

consider this shows Mr Hazlett had formed a view on the truth of the CB quadruple hearsay evidence without first properly assessing it.

[139] The evidence satisfied me Mr Hazlett predetermined the allegations against Mr Burtton.

*Outcome letter inadequate*

[140] Although Talley's put four disciplinary allegations to Mr Burtton, Mr Hazlett's outcome letter only addressed two of the four allegations. Mr Hazlett acknowledged it was poorly drafted and did not deal satisfactorily with the points Mr Burtton had raised.

[141] After he was dismissed Mr Burtton's representative asked Talley's to provide him with its findings on each of its allegations, but Talley's never responded. When giving evidence Mr Hazlett sought to justify his dismissal decision on the basis of information that was not included in the outcome letter.

[142] A fair and reasonable employer would advise an employee if it had made disciplinary findings against them, so it was reasonable to assume the allegations not addressed in the outcome letter had not been established. Talley's cannot now put forward new findings, which were not communicated to Mr Burtton at the time, to justify its dismissal.

[143] Talley's substantive justification of Mr Burtton's dismissal rests on the findings it made about the disciplinary allegations it had put to him, which are to be gleaned from the information it communicated to him in its outcome letter.

(i) Possession or use of drugs allegation

[144] Mr Hazlett's letter concluded on the *possession or use of drugs allegation the drug dog indicated the presence of narcotics on your bags. I am satisfied that the dog's indication was correct.*

[145] The drug dog's indication was the only evidence Talley's relied on in support of its finding the allegation *possession or use of drugs* had been established because it is the only information referred to.

[146] I find the drug dog indication could not reasonably have supported the allegation of possession or use of drugs by Mr Burtton. The dog did not find any drugs in

Mr Burton's possession. Nor did Mr White find drugs when he searched Mr Burton and his possessions. Accordingly, I find Talley's had no evidence of possession of drugs by Mr Burton.

[147] Mr Hazlett's evidence was that Talley's did not discipline crew where there was only a drug dog indication. Max gave the same indication for six crew. Mr Browne and Mr Burton were dismissed. JM was suspended but returned to work and no action was taken over DT, JH and MS.

[148] Mr Burton was clearly treated differently than four other crew and Mr Hazlett was unable to satisfy me he had fair and reasonable grounds for doing so.

[149] No reference was made to the *use of drugs* part of the allegation, so it is reasonable to assume that part of the allegation had not been established.

(ii) Dishonesty allegation

[150] In terms of the dishonesty allegation, Mr Hazlett's letter stated:

*I am not satisfied that your versions of events in terms of your conversations with others is correct. The reality is that either the investigator or our operations manager, Andy Smith, are lying or you are.*

[151] There is no explanation as to which conversations Talley's considered Mr Burton had been dishonest about or who he was supposed to have lied to or what he was supposed to have been dishonest about, or the circumstances of his alleged dishonesty. Nor is there any explanation about why Mr Hazlett considered Mr Burton's *incorrect version of events* amounted to dishonesty as opposed to a genuine mistake, confusion, or forgetfulness or some other non blameworthy reason.

[152] A fair and reasonable employer would have properly considered these issues and it would have advised the employee what its conclusions about them were and it would have recorded the reasons for its findings. I find it was unfair for Mr Hazlett to have summarily dismissed Mr Burton for dishonesty without first identifying what matters he had been dishonest about.

(iii) Other

[153] Mr Hazlett stated in the outcome letter:

*You advised that your phone listed Karl Browne as Karl ‘Crackup’ Browne and not ‘Crackie’. I do not accept that, but prefer their evidence, more particularly as they both also recall you explaining the term as a reference to Mr Browne’s past drug use.*

*In effect, I can only conclude that you have lied, not only to them while being interviewed but also to me during the disciplinary hearing.*

[154] This was not a disciplinary allegation and it had not been disclosed to Mr Burtton as information Talley’s was relying on in support of its dishonesty allegation. However, it was clearly a matter which influenced Mr Hazlett’s view of Mr Burtton’s honesty, so the significant conclusion Mr Hazlett reached on the Crackie/Crack Up conflict (i.e that Mr Burtton was lying) should have been put to Mr Burtton in advance of his disciplinary meeting.<sup>22</sup>

[155] Mr Hazlett’s letter did not refer at all to the two matters Talley’s had disclosed in support of its dishonesty allegation but it was clear from his evidence they were both factors in his finding of dishonesty.

A *Length of time Mr Burtton had known Mr Browne*

[156] Mr Hazlett believed Mr Burtton had lied about only knowing Mr Browne *from the boat* (i.e. after Mr Browne started work on *The Enterprise*).

[157] This view was based on a response given by Mr Browne during his disciplinary meeting when he was asked how long he had known Mr Burtton. Mr Browne said *about four years, when I first met him [...]*.

[158] The problem with Mr Hazlett relying on that response to establish dishonesty is that Talley’s did not ask Mr Browne for any further information about his answer. Mr Browne was not told why that question was significant, or that Mr Burtton had said they only knew each other from the boat, so Mr Browne had not necessarily given a clear or considered response.

[159] If he had been asked to clarify what he meant, Mr Browne would have said he first met Mr Burtton briefly four years ago but did not get to know him until they worked together on *The Enterprise*. Mr Browne’s evidence was that Mr Burtton turned up with Mr Browne’s flatmate at their flat on the way to a party about four years ago. He said he spoke to Mr Burtton for approximately ten minutes but their meeting stuck in his mind

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<sup>22</sup> Ibid 7

because Mr Burtton told him he worked on the boats, which was what Mr Browne wanted to do. Mr Browne said he was not surprised Mr Burtton did not recall their brief first meeting four years ago because it was so short and would not have had any significance for Mr Burtton.

[160] This explanation of Mr Browne's response was relevant to Mr Hazlett's assessment of whether or not Mr Burtton had been dishonest, but because Talley's did not ask Mr Browne any follow up questions it did not have this relevant information, which meant Mr Hazlett was not able to make a fully informed decision about the dishonesty allegation.

*B Mr Burtton's denial of his call to Mr Browne on 12 May 2010*

[161] The second limb of the dishonesty allegation information disclosed to Mr Burtton related to his response when he was interviewed on 13 May 2010. Mr Milne twice asked Mr Browne if he had spoken to Mr Browne or JM, and Mr Burtton twice denied he had.

[162] Mr Hazlett's outcome letter did not explain why he considered Mr Burtton had lied instead of being mistaken, forgetful, confused or some other non blameworthy reason and he also failed to explain that in his witness statement. There was no evidence Mr Hazlett considered Mr Burtton's explanation the call had slipped his mind due to the very stressful time he had had at the hospital immediately before he was interviewed. Mr Hazlett should have properly considered that explanation and he should have had good reasons for discounting it. He did not satisfy me he did so.

[163] In evidence Mr Hazlett said he believed Mr Burtton lied about the call on 12 May 2010 because:

- He had made threats in it,
- He had purposely deleted the call record to conceal the way Mr Browne's name had been recorded in his contacts;
- He lied about the way Mr Browne's name had been stored in his phone to cover up Mr Browne's drug use.

[164] I find Mr Hazlett's belief Mr Burtton made threats in his call to Mr Browne was unreasonable and not supported by the information available at the time. The other two

matters were significant conclusions which should have been, but were not, put to Mr Burtton to respond to.<sup>23</sup> It was unfair of Mr Hazlett to rely on these matters without first giving Mr Burtton a chance to be heard on them and without properly considering his response.

[165] Mr Hazlett did not conduct a full or fair investigation into the dishonesty concerns so he could not have had a reasonable belief Mr Burtton had been dishonest.

### **Conclusion**

[166] Talley's dismissal of Mr Burtton was substantively and procedurally unjustified.

[167] I consider Mr Hazlett was improperly influenced by unreliable hearsay and by unsubstantiated gossip and rumours. Whilst Talley's had grounds to be concerned about drug use on its vessels, the manner in which it investigated those concerns was seriously defective.

[168] It made assumptions which were not supported by the information available. It did not follow up obvious lines of inquiry. It relied on quadruple or worse hearsay. It did not ask basic questions of the people who had provided it with information. There was no critical assessment or weighing up of the evidence it had obtained. There was disparity of treatment which was not satisfactorily explained. It breached its contractual and statutory good faith obligations. It did not have an accurate record of the information it said it had received. The decision maker did not approach this matter with an open mind.

### **Remedies**

[169] Although Mr Burtton sought permanent reinstatement in his Statement of Problem, this remedy was withdrawn prior to the Authority's investigation.

#### *Mitigation of loss*

[170] Mr Burtton was obliged to take reasonable steps to mitigate his loss and he gave evidence about the steps he had taken to find a new job. Mr Burtton also alleged Ms Plum had undermined his approach to Sealords for work, but I find the evidence did not support that allegation.

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<sup>23</sup> Ibid 7

[171] Mr Burtton obtained casual employment with Sanford from 6 October 2010. He was offered a second trip which left on or about 19 November 2010, but which he had to decline in order to be available for the Authority's investigation meeting held in December 2010.

[172] I find that Mr Burtton did take appropriate steps to mitigate his loss and he is entitled to lost remuneration.

#### *Lost remuneration*

[173] Mr Burtton claimed lost remuneration from 13 May to 8 December 2010 of \$35,697.10. He said if he had remained in employment at Talley's he would have earned \$45,736.55 up until 8 December 2010 but he had only earned \$10,039.45 gross since his dismissal.

[174] I am satisfied Mr Burtton lost remuneration as a result of his personal grievances, and I award him \$35,697.10 under s128(3) of the Act.

[175] Mr Burtton's unpaid catch bonuses are to be treated as lost remuneration because they contractually form part of his remuneration.<sup>24</sup> Mr Burtton's catch bonuses are to be calculated as if he had not been suspended without pay and as if his employment did not end until 8 December 2010.

[176] If these are not already included in the \$35,697.10 Mr Burtton claimed as lost remuneration, then they must be added to that amount.

#### *Interest*

[177] Mr Burtton claimed interest on his lost remuneration.

[178] The Authority has jurisdiction under clause 11 of Schedule 2 of the Employment Relations Act 2000 ("the Act") to award interest at the rate set by the Judicature (Prescribed Rate of Interest) Order 2008, which is the means of setting the rate authorised by the Judicature Act 1908.<sup>25</sup>

[179] Mr Burtton has been without his wages from Talley's since he was suspended on 13 May 2010 and I consider this is an appropriate case in which to award interest.

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<sup>24</sup> IEA – clauses 6 and 7

<sup>25</sup> s.87(3) Judicature Act 1908

[180] I order Talley's to pay Mr Burtton interest on his lost remuneration (which is to include his unpaid catch bonuses) at the rate of 8.4% <sup>26</sup> per annum from 25 June 2010, which was the date of his dismissal. I have used this later date instead of 13 May 2010 (the date he was suspended) in recognition of the high rate of interest awarded, which the Authority has no power to adjust.<sup>27</sup>

*Loss of benefits*

[181] Mr Burtton in his Statement of Problem claimed *compensation for loss of any benefits* but he did not specify what those benefits were and he did not quantify his claim.

[182] In a memorandum dated 29 October 2010 Ms Sharma amended the remedies claimed by Mr Burtton which included a claim (among other things) *for payment of notice, plus interest in accordance with clause 11.1 of the contract (sic) of employment*. Ms Sharma subsequently advised that the reference to clause 11.1 should have been to clause 11.4 of Mr Burtton's employment agreement.

[183] Mr Burtton in his brief claimed he was entitled to payment under clause 11.2 of his employment agreement, but he said he did not know what he was owed.

[184] Ms Sharma's submissions did not address Mr Burtton's lost benefits claim.

[185] Clause 11.2 applies to employees with one year or less service, so I find it does not apply to Mr Burtton, who had been employed for six years.

[186] Clause 11.4 of Mr Burtton's employment agreement applied to employees with more than one year's service. It provided a mechanism for calculating the catch bonus to be paid upon termination, provided the employee gave the correct contractual notice and the employment ended for reasons other than serious misconduct.

[187] Talley's dismissal of Mr Burtton on the grounds of serious misconduct was unjustified, so it does not prevent the operation of clause 11.4. Accordingly, if Mr Burtton had not been unjustifiably dismissed then, subject to meeting the qualifying criteria in clause 11.4, he would have received a full catch bonus share.

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<sup>26</sup> As set by the Judicature (Prescribed Rate of Interest) Order 2008

<sup>27</sup> The Authority is bound by the Judicature (Prescribed Rate of Interest) Order 2008 and cannot adjust the rate of interest awarded, so the current rate of 8.4% per annum must be applied.

[188] Clause 11.4 stated that upon termination, an employee who has immediately completed two trips (or one trip on for those on the trip on/trip off system) is entitled to receive a full catch bonus share for the paid trip off following.

[189] If Mr Burtton's trips on/trips off meant he met the requirements of clause 11.4, then he was entitled to be paid a full catch bonus upon termination and Talley's failure to pay it means he has lost a benefit. I consider the termination date to be used when calculating Mr Burtton's entitlements (if any) is 8 December 2010 (not his actual date of termination) because that is the date up to which he claimed, and has been awarded, lost remuneration.

[190] I did not have sufficient information to determine whether Mr Burtton qualified under clause 11.4 for a full catch bonus share or (if he did qualify) to quantify his entitlement.

[191] The parties are directed to attempt to agree the amount of catch bonus (if any) Mr Burtton would have been entitled to under clause 11.4 of his employment agreement if his employment had ended on 8 December 2010 as a result of the correct contractual notice having been given by either party. If agreement is not reached within 14 days from the date of this determination, the parties may apply to the Authority to fix that amount.

#### *Injury to reputation*

[192] Mr Burtton sought \$15,000 for injury to his reputation. The availability of reputational damages is an important question of law which has not yet been resolved by the Employment Court.<sup>28</sup> However, I do not have to resolve that issue because even if reputational damages could be awarded, this is not an appropriate case for such an award because Mr Burtton's evidence did not satisfy me he had suffered reputational damage.

[193] Mr Burtton's evidence under this head of claim can more properly be described as evidence which supported his claim for hurt and humiliation. It described his feelings and in particular his humiliation and distress. Mr Burtton referred to his belief he had *been branded a P user and supplier of the drug to young girls* as a result of media publicity arising from his interim reinstatement application and subsequent challenge to the Court.

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<sup>28</sup> *George v Auckland Regional Council* [2010] NZEMPC 138

[194] If it is not already clear from my findings, I record I did not hear any credible evidence that Mr Burtton had used P on the vessel. Mr Hazlett's evidence was that he had never believed Mr Burtton had supplied P to young female crew, and he believed he had made that clear in the interim reinstatement application, so was surprised the media had publicised that. Mr Shingleton deposed in his affidavit that his references to Ms Plum about P being supplied to young females had nothing to do with Mr Burtton but related to crew on a different vessel, not *The Enterprise*. I note Mr Shingleton's evidence was unchallenged, and I accept it.

[195] I have considered Mr Burtton's evidence about injury to his reputation as part of his claim for hurt and humiliation.

*Hurt, distress and humiliation*

[196] In Ms Sharma's memorandum of 29 October 2010 Mr Burtton sought \$15,000 for his disadvantage grievance and \$25,000 for his dismissal grievance. In submissions Ms Sharma's submitted the Authority should make a global hurt and humiliation award of \$35,000.

[197] Mr Burtton gave evidence that he had suffered considerable hurt, distress and humiliation. He described the situation as being happily employed and the next being unceremoniously dumped from his much-loved job on *The Enterprise*. He had worked on the ship for six years, since he had been 19. His girlfriend and many friends also worked on *The Enterprise*.

[198] Mr Burtton described how he felt powerless and at the whim of his employer, especially so during the suspension period when the company would not communicate with him about what was happening with his employment situation. He had no income and no way of supporting himself. His parents had just moved to Australia, so he was without family support, which he said made him feel very isolated.

[199] Mr Burtton was detrimentally affected by the negative publicity which arose from the unsuccessful interim reinstatement application and the unsuccessful challenge to that. He was named in the media as someone who allegedly supplied P to young female crew, when Talley's never had any information he had done so. It was highly misleading and extremely unfair for Talley's to suggest it had. Mr Burtton described feeling positively ill about that allegation which he found highly offensive.

[200] Mr Burtton believed his reputation had been destroyed because he has been branded a P user and a liar and that he feels he has been hung out to dry and tried and convicted without being heard fairly on the issues around his dismissal.

[201] Mr Burtton said the situation had ruined his life and had taken an adverse toll on his health. He had a depressive episode and required medical attention, which resulted in medication. He has experienced problems with extremely low mood. He has been dependent on his girlfriend for financial support which he found difficult. His relationship has suffered because he has been angry about the impact on his life and he has found it stressful not having permanent work. He said at times he felt like a caged animal.

[202] The evidence I heard satisfied me that Mr Burtton has suffered significant hurt, humiliation and distress and I consider a significant award is appropriate. I consider that the evidence supported a higher award than Mr Browne because Mr Burtton suffered a depressive episode and required medical attention and medication. Mr Browne did not require medical assistance.

[203] Mr Burtton was also humiliated when a potential employment opportunity at Sealords his girlfriend had set up for him was derailed when Sealords found out he had been summarily dismissed for drug related concerns.

[204] I award Mr Burtton \$23,000 under s123(1)(c)(i) of the Act.

#### *Contribution*

[205] Pursuant to s124 of the Act, I am required to consider the extent to which Mr Burtton's actions contributed to the situation which gave rise to the personal grievances and, if appropriate, reduce remedies accordingly.

[206] Mr Burtton twice denied making a phone call to Mr Browne when asked about it and he denied storing Mr Browne's name as *Karl Crackie* in his phone. These matters influenced Mr Smith's decision to suspend him and Mr Hazlett's decision to dismiss him, so I find Mr Burtton's actions did contribute to the situation which gave rise to his two grievances.

[207] I consider Mr Burtton's award of distress compensation should be reduced by 20% to reflect this contribution. Accordingly, under section 124 of the Act Mr Burtton's award of \$23,000 under s123(1)(c)(i) of the Act is to be reduced to \$18,400.

### **Penalty**

[208] Mr Burtton sought a \$5,000 penalty against Talley's for its breaches of the good faith obligations in s4(1A)(c) of the Act and he applied to have the penalty paid to him.

[209] Section 4A of the Act allows the Authority to impose a penalty for certain breaches of good faith. A penalty can be imposed on a party who fails to comply with the s4(1) duty of good faith if that failure was deliberate, serious, and sustained, or was intended to undermine bargaining for an employment agreement, an employment agreement, or an employment relationship.

[210] I find that Talley's' breach of its good faith obligations was not deliberate or sustained, so s.4A does not apply.

[211] I consider Talley's' failure to disclose all information relevant to its consideration of the continuation of Mr Burtton's employment was inadvertent, not deliberate, and occurred because it did not keep accurate records of the information it had in support of its disciplinary concerns.

[212] The evidence from Talley's' witnesses was that they believed they had disclosed all relevant information in advance of Mr Burtton's disciplinary meeting, so they believed he did have an opportunity to comment on it. This view was incorrect but, after hearing from Mr Hazlett and Ms Plum, I accept it was a genuine mistake rather than a deliberate breach of good faith.

[213] Accordingly, I decline to impose a penalty on Talley's.

### **Outcome**

[214] Talley's is to pay Mr Burtton \$35,697.10 pursuant to s128(3) of the Act plus any catch bonuses he is entitled to which were not already included in that amount.

[215] Talley's is to pay Mr Burtton the amount (if any) of the catch bonus he is entitled to under clause 11.4 of his employment agreement. The parties should attempt to agree on

this amount, but if agreement is not reached within 14 days they may apply to the Authority to fix that amount.

[216] Talley's is to pay Mr Burtton \$18,400 pursuant to s123(1)(c)(i) of the Act.

**Costs**

[217] Costs are reserved.

[218] Mr Browne as the successful party is entitled to a contribution towards his legal costs. The parties are encouraged to attempt to agree costs between them.

[219] If costs are not resolved by agreement, they may be addressed by an exchange of memoranda. The applicant's memorandum is to be filed within 21 days of the date of this determination and the respondent's memorandum is to be filed 14 days after that, with the applicant having 7 days within which to file submissions in reply.

[220] I am told there was no without prejudice except as to costs offers in this case. If that is correct, subject to the parties' submissions, the Authority is likely to adopt its usual daily tariff based approach towards costs.

**Rachel Larmer**  
**Member of the Employment Relations Authority**