

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Helen Claire Danielsen (Applicant)
AND Amaltal Fishing Company Limited (Respondent)
REPRESENTATIVES Steven Zindel and Mary Moorhead, Counsel for Applicant
Anthony G Stallard, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 1 September 2004
29 October 2004
19 November 2004
SUBMISSIONS RECEIVED 19 September 2004 from the applicant
14 December 2004 from the respondent
22 December 2004 from both parties
DATE OF DETERMINATION 17 February 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Helen Danielsen, the applicant says that her problem is that she was unjustifiably suspended or dismissed from her employment with the respondent.

[2] The respondent, Amaltal Fishing Company Limited (“Amaltal”) says that Ms Danielsen resigned or in the event that it is found she did not resign that she was justifiably dismissed or suspended on or about 15 July 2002.

[3] The parties attended mediation but were unable to resolve the issues between them.

The Background

[4] The following facts providing background of the employment relationship are not in dispute.

[5] Ms Danielsen commenced employment with Amaltal on 16 July 1999.

[6] She was employed at the material time as a galley assistant on Amaltal’s fishing vessel, MFV Amaltal Columbia.

[7] Ms Danielsen's work was covered by the MFV Amaltal Columbia collective employment agreement effective 1 October 2001 to 30 September 2002 ("the collective agreement"). Amaltal was a party to the collective agreement together with the union New Zealand Fishing Industry Guild Incorporated. The agreement covered all union members employed as crew on the MFV Amaltal Columbia.

[8] Ms Danielsen worked for Amaltal on a rotational crewing system of trip on/trip off. The voyages were about six to seven weeks in duration. Ms Danielsen was paid for her trips off but not for the turn around time.

[9] When at sea on the fishing vessel Ms Danielsen was required to work every day. She would commence her duties between 5.00 and 5.30am and work through until about 2.30pm. She would then have a break until 5.00pm when she resumed duties until 8.00pm. Ms Danielsen's duties included setting up for breakfast, lunch and dinner, cleaning up following the meals, loading dishes for washing, general cleaning about the vessel, doing the laundry for the crew and some food preparation to help the cook if necessary. As the trip was coming to an end Ms Danielsen would commence a more extensive clean up and perform a stock take.

[10] In this case the main areas of dispute are about what occurred during the period 14 July 2002 to 16 July 2002. I shall set out the evidence about the meetings that occurred during that period with my findings about any disputed evidence.

14 July 2002

[11] Ms Danielsen had been on a *trip off* from 28 May 2002. She met the Columbia on Sunday 14 July 2002 in order to assist with getting the boat ready for the next trip to sea which was scheduled for Tuesday 16 July 2002. During the turn around time Ms Danielsen was required to help the cook prepare meals for crew and any shore based staff working on the vessel. She would also load stores and help ready the boat for the next trip to sea.

[12] Ms Danielsen had recently found out that she was pregnant on or about 7 July 2002. She advised the Captain of the vessel, Steven Linton. Captain Linton congratulated Ms Danielsen and indicated to her that he required a doctor's certificate. I accept that Ms Danielsen mentioned to Captain Linton that she was seeing a midwife.

15 July 2002

[13] On 15 July Ms Danielsen started work at about 6am to help prepare breakfast for the crew and tidy up. She left the boat mid morning to collect a letter from her midwife. The letter dated 15 July 2002 from Ms Danielsen's midwife provided:

I am writing with regards to Helen Danielson, for whom I am locum midwife while her Lead Maternity Carer is away.

Helen is currently 8 weeks into her pregnancy, and her estimated date of delivery is 1/3/03. All initial tests and screening indicate that Helen is in excellent physical health for her pregnancy, and I have no hesitation in recommending that she continue her employment as usual. With regards to her up and coming fishing trip with her employers, Helen is completely fit to travel.

Please do not hesitate to contact me at the above telephone number to confirm any details of this letter.

Yours sincerely,

(signed)

Fiona Malthus

[14] Ms Danielsen gave Captain Linton the letter on her return to the ship. Captain Linton said that he probably told Ms Danielsen that the letter was in order. Ms Danielsen went back to work.

[15] On 14 or 15 July a telephone conversation had taken place between Captain Linton and the Vessel Manager for Amaltal Columbia, Jamie Clark. Captain Linton advised Mr Clark that he was not really happy with Ms Danielsen sailing in her condition and asked Mr Clark what the company policy was and where to go to from that point.

Initial exchange 2pm

[16] Mr Clark went to see Ms Danielsen at about 2pm on 15 July 2002 to set up a meeting with her. I put Ms Danielsen's evidence about this initial brief exchange to Mr Clark and he agreed with it. Over time memories fade and often neither party is in a position to recall word for word what was said. Mr Clark accepted the evidence of Ms Danielsen about the exchange. There was reference I find during the exchange to a policy of Ken Atkinson, the General Manager, that an employee could not go to sea if pregnant. Mr Clark said to me that it was really a commonsense policy about the fitness of an employee to go to sea. Ms Danielsen advised Mr Clark during that initial meeting that she was fit and strong and would be *OK*. I also conclude it was more probable than not that Mr Clark did make a statement to the effect that the company would prefer that she not sail. I have relied in reaching that conclusion on the written notes that Mr Clark took and on Ms Danielsen's own evidence that she felt *quite despondent* after the conversation. It was agreed that there would be a further meeting to discuss the matter at 3pm.

Events between 2pm and 3pm 15 July 2002

[17] In the ordinary course of events Mr Clark would have raised the issue of Ms Danielsen's fitness to go to sea with Mr Atkinson however Mr Atkinson was unavailable at the time, possibly overseas on business.

[18] Mr Clark asked Ruth, an employee from the human resources department of Amaltal to make enquiries with an approved Maritime Safety Authority doctor about Ms Danielsen going to sea.

[19] These enquiries were made of Dr John Ryder who is a registered medical practitioner and has been a general practitioner since 1969. Dr Ryder has been a Maritime Safety Authority ("MSA") approved doctor since July 1998 and is a director of a company that provides advice on workplace health and rehabilitation matters called Ramazzini. Approved MSA medical practitioners are appointed, and their functions determined, under Part 34 of the Maritime Rules. Although the rules do not apply in terms of Ms Danielsen going to sea Dr Ryder was of the view that the principles underlying the performance of the approved MSA doctor's functions under Part 34 of the Rules were relevant in assessing whether a woman in the first trimester of pregnancy was safe to go to sea.

[20] I accept that Dr Ryder advised Ruth who, in turn, advised Mr Clark that in his opinion there were risks if Ms Danielsen went to sea for a period of five to six weeks. Dr Ryder expanded on these concerns in his evidence at the investigation meeting. There was general agreement from the medical evidence that the most significant risks to women in the first 12 weeks of gestation are

miscarriage with associated bleeding, ectopic pregnancy and dehydration as a side effect of seasickness/morning sickness.

[21] Dr Ryder said that there were issues in the event of an emergency for a pregnant woman at sea with respect to the availability of medical care in the event of an emergency and issues with respect to evacuation. Dr Ryder said that although he had not seen the certificate from Fiona Malthus when talking to Ruth it would not have changed his view.

Meeting 3pm

[22] There is significant dispute as to what was said at this meeting. I have to determine matters on the balance of probabilities which requires me to conclude what is more likely than not to have occurred.

[23] Mr Clark met with Ms Danielsen at 3pm. Captain Linton was also present.

[24] There was agreement that Mr Clark and Captain Linton discussed with Ms Danielsen in a cabin on the Columbia the fact that they were not happy with her sailing in her pregnant condition. I find that Mr Clark did most of the talking and was quite firm when he discussed the dangers and concerns with Ms Danielsen including the medical advice received from Dr Ryder. There were words said to the effect that Ms Danielsen was putting the baby, herself, the crew and the boat at risk if she did sail. I find that Ms Danielsen was insistent that she was fit and well to travel. There are two particular matters in dispute. The first is whether either Mr Clark or Captain Linton advised Ms Danielsen that they could not stop her from sailing and the second is whether Ms Danielsen advised Mr Clark and Captain Linton that she would resign and not sail. Mr Clark said that he prepared notes of the two meetings approximately ten minutes after the meeting concluded. The notes provide in terms of the second meeting:

15 - 7 - 02

3pm Chief Engineers cabin Present – Steve Linton, Jamie Clark, Helen Danielson.

Jamie Clark explained to Helen the risks of going to sea, that we have spoken to Amaltal's M.S.A Doctor Dr Ryder who commented that "8 to 12 weeks is the Highest risk time of a pregnancy and if Helen gets sea sick it is a risk to the babys Health. I commented that "we cannot stop you from sailing but it is in the best interests of yourself, baby and the vessel if you would stand down.

Helen said "OK I will resign. and will not sail This trip.

[25] I put the notes to Ms Danielsen. She did not accept that she was told at the meeting that they would not stop her from sailing. She said that had that been said to her she would have sailed. Ms Danielsen denied saying *OK I will resign and not sail this trip*. Ms Danielsen said that she left the meeting upset and angry following the discussion but was not told that her employment was terminated and she said that she did not resign. Ms Danielsen said that the actions of Amaltal were bullying or pressuring her to go and she ended up going quite quietly but did not say that she resigned.

[26] Mr Clark said that whilst the company preferred Ms Danielsen not sail she resigned and there was no need to make a decision on the matter. He said that he was very clear that she had resigned at the second meeting and on that basis he took immediate steps to replace her. He said that Ms Danielsen was a bit upset and there were some tears but she came right again.

[27] I put Mr Clark's notes to Captain Linton. He said that they *pretty much* accorded with his recollection of the meeting except that Ms Danielsen did not say *OK I will resign*. Captain Linton said that Ms Danielsen got a little upset and left the room to calm down a bit. He said that she came back into the room and said *she would not sail* and the meeting ended. Captain Linton said that he thought he advised Ms Danielsen at that point that she should go and see Mr Atkinson and he may be able to help her out with something although I find that it may well have been Mr Clark who made that suggestion. Captain Linton described the suggestion as being more of a direction.

[28] Captain Linton recalled that he and Mr Clark recommended to Ms Danielsen that she not sail. He said that Ms Danielsen seemed to think that she could get off the boat if anything went wrong. Captain Linton said he explained to Ms Danielsen that it is not always possible to get someone off a boat. Captain Linton said that he did advise Ms Danielsen that he would not tell her that she couldn't sail but that she shouldn't sail for the baby's safety and the safety of the crew.

[29] I turn firstly to the disputed issue as to whether Ms Danielsen was told during the 15 July meeting that the company could not stop her from sailing.

[30] I observed Ms Danielsen throughout my investigation of this problem. Ms Danielsen has a generally determined manner. At the time of the 15 July meeting Ms Danielsen was insistent that she was fit to sail. She had obtained a letter from her midwife as to her fitness. In those circumstances if Ms Danielsen had been told by Mr Clark or Captain Linton that they could not prevent her sailing I find it would have been more likely than not that she would have sailed. On the balance of probabilities I conclude it was less likely that either of them would make a statement to Ms Danielsen along the lines that the company would not prevent her going to sea.

[31] I turn to whether Ms Danielsen said that she resigned and would not sail. I have considered the exchanges throughout the meeting and the events following the meeting. I prefer Captain Linton's evidence to Mr Clark's evidence that Ms Danielsen did not say *Ok I will resign*. Captain Linton was quite certain that had not been said and his evidence on the matter was straightforward. Unlike Mr Clark he was not faced with any further responsibility for the matter as he would be at sea for some weeks. I was of the view that Mr Clark anticipated that Ms Danielsen may well take the matter further when he wrote his notes up and he had immediately sought to replace Ms Danielsen on the vessel. The note taken by Mr Clark reflects a noticeable whiteout between the word resign and the next word. I find the notes in that respect to be unreliable. I am not satisfied therefore that Ms Danielsen said *Ok I will resign*. I do find that it is more likely than not Ms Danielsen did return to Mr Clark and Captain Linton after a brief period outside the cabin and say words to the effect *I will not sail*. Captain Linton said to me that after Ms Danielsen had said she would not sail that it was *more or less* her resignation.

[32] After the meeting Ms Danielsen returned to work until 7.15pm.

16 July 2002

[33] Ms Danielsen returned to work on Tuesday 16 July 2002 at about 8am to load on the food supplies and stores. She noticed a young woman on the vessel and asked if she needed help. The woman explained to Ms Danielsen that she was the new galley assistant. Ms Danielsen showed the new galley assistant around the vessel, talked briefly about the job and introduced her to the crew. Ms Danielsen said that it was the first she knew that she had been replaced. Ms Danielsen met Captain Linton in the corridor and he recalled that she was upset. Ms Danielsen may have been crying at the time. I am satisfied that Captain Linton said something comforting to her and may have given her a hug and said she would be OK. I am not satisfied that he made her any firm commitment about finding other work.

[34] Ms Danielsen left the boat after lunch because the boat was due to sail and, I accept, attempted to talk to Mr Atkinson but he was not available. She said that when she left the boat people saw her cry and that it was a very humiliating and distressing experience.

[35] On 17 July 2002 Ms Danielsen went to see Ruth in the office at Amaltal to enquire about maternity leave. Although I did not hear from Ruth I have no reason not to accept Ms Danielsen's evidence that she was advised by Ruth Amaltal did not have maternity leave and that she should see about getting the unemployment benefit. She was further told that she should put on the form that she had resigned. I am satisfied that Ms Danielsen told Ruth she had not resigned and Ruth's response was that she had not been sacked. I further accept Ms Danielsen's evidence that there was mention by Ruth about the possibility of Ms Danielsen having an accident at sea and being liable for the cost of getting a rescue helicopter out to the boat and whether she could she afford \$60,000.00? Ms Danielsen said she was also advised not to tell anyone she was pregnant when she went to job interviews.

[36] Ms Danielsen then went to see an employment advocate, Reg Connor. On 30 July 2002 he wrote a letter on Ms Danielsen's behalf to Amaltal submitting a personal grievance and confirming Ms Danielsen's view that she had not resigned. Mr Connor wrote in that letter about Ms Danielsen's exchanges with Ruth which accorded with Ms Danielsen's evidence that she gave at the investigation meeting.

[37] Mediation took place in October 2002.

[38] Mr Stallard in an open letter dated 22 October 2002 set out the following offer but maintained Amaltal's position that Ms Danielsen had resigned:

- a. *Amaltal will pay Ms Danielson for the two days worked after her resignation.*
- b. *Ms Danielson will be accepted back to work within a period of 12 months of the date of her resignation as if she had elected to take maternity leave.*
- c. *A full time position as a security guard is available to her immediately, with the work involving 12 hours on, 12 hours off for a period of two weeks and then a further seven days off. The salary is \$35,000.00.*

[39] Ms Danielsen did not consider the work as a security guard would be safe for her and did not accept the position as offered or the other offers.

[40] Ms Danielsen applied during August and September 2002 for positions but was unsuccessful. She said that she did not apply for positions after September 2002 as she felt depressed.

The issues

[41] The issues that require determination in this case are:

[42] Whether Ms Danielsen resigned or whether she was suspended or dismissed on 15 July 2002.

[43] If Ms Danielsen was dismissed whether dismissal was justified in the circumstances.

[44] Whether as claimed in an amendment to the statement of problem the respondent dismissed or suspended the applicant by reason of her pregnancy contrary to section 104 and 105 of the Employment Relations Act 2000.

[45] Whether Ms Danielsen is within the timeframe under the Parental Leave and Employment Protection Act 1987 to bring a parental leave complaint under section 49?

[46] Whether the applicant is entitled to a penalty under the Parental Leave and Employment Protection Act 1987 on the alleged grounds that Amaltal misled her about her entitlements?

[47] Whether as claimed in final submissions from the applicant Amaltal had breached the provisions of the Fair Trading Act 1986.

Analysis and Conclusions

Was there a suspension of Ms Danielsen's employment?

[48] I do not consider that Ms Danielsen's employment was suspended. It was made quite clear to Ms Danielsen on 16 July 2002 that Amaltal considered she had resigned and there was no ongoing interaction anticipated after 16 July.

Was there a resignation or a dismissal, actual or constructive?

[49] The answer to this question is to be found in the evidence about the 3pm meeting on 15 July 2002.

[50] It was Mr Clark's initiative prior to that meeting to seek further medical advice about Ms Danielsen's fitness to sail. There were tight timeframes with the vessel departing the following day.

[51] I am required to consider whether the words *would not sail* were capable of amounting to a resignation or whether they amounted to a voluntary agreement to stand down from sailing but were insufficient to amount to a termination of the employment agreement.

[52] I do not find that Ms Danielsen's words *I will not sail* amount to a resignation. Her return to work later that same day and the next day are actions inconsistent with resignation. What Ms Danielsen's future with the company was at that stage was unclear and no-one from Amaltal addressed the issue with her leaving her to form her own views on the matter.

[53] Ms Danielsen was then advised on 17 July 2002 that Amaltal was of the view that she had resigned. It is a position Amaltal has steadfastly and I find unjustifiably as a matter of fact maintained throughout this matter. Ms Danielsen did not resign. She did not use words capable of amounting to a resignation. This was confirmed by Captain Linton in his evidence. It was made clear to Amaltal that Ms Danielsen had not resigned both in the discussion with Ruth on 17 July 2002 and in Mr Connor's letter of 30 July 2002. I find that Amaltal in maintaining its position that Ms Danielsen had resigned dismissed Ms Danielsen from her employment.

Was dismissal justified?

[54] I am of the view that there is an absence of justification for the dismissal. Captain Linton described Ms Danielsen as an excellent worker who was self motivated and popular. Clearly the situation in the absence of a resignation called for discussion with Ms Danielsen about her future with the company. This discussion would no doubt have included options under the Parental Leave and Employment Protection Act 1987 such as a temporary transfer to another job within Amaltal or early commencement of maternity leave if no alternative position was available particularly as one would hope she had been advised to have a representative present.

[55] Mr Stallard submitted that there was no obligation for Amaltal to provide alternative employment. I find that there was an obligation to discuss and consider alternatives to sailing with Ms Danielsen. It was not enough to simply tell Ms Danielsen to see Mr Atkinson on 15 July 2002 and then for the company to maintain a position she had resigned.

Determination

[56] I find that Ms Danielsen has a personal grievance that she was unjustifiably dismissed and she is entitled to remedies.

[57] Having reached that finding I am not required to consider separately the issue of discrimination or the parental leave complaint. It did appear to me in terms of the latter that any complaint may well have been outside of the time limit in terms of section 56(2) of the Parental Leave and Employment Protection Act 1987.

[58] The claim under the Fair Trading Act 1987 was first raised in final submissions by the applicant, that Amaltal had misled Ms Danielsen as to her parental leave entitlements. I am not satisfied that the evidence is capable of supporting a finding that the Authority has jurisdiction in terms of the claim given my finding of an unjustified dismissal and/or that there has been a breach of section 9 of the Act.

[59] I now turn to the claim for a penalty. The only penalty which can be awarded by the Authority under the Parental Leave and Employment Protection Act 1987 is in terms of section 71 and that section does not appear to be applicable in this case. If the claim for a penalty is under the previous section 133 of the Employment Relations Act 2000 for breach of an employment agreement then it was not commenced within 12 months after the cause of action arose. In any event I would not have been minded to impose any penalty on Amaltal in addition to the grievance I have found to have been established.

Remedies

Reimbursement of lost wages

[60] I am required to consider whether the actions of Ms Danielsen contributed to the situation giving rise to the personal grievance. Quite properly Mr Stallard accepted in his submission that pregnancy could not amount to contributory conduct and I do not find there to be any contributory conduct that requires a reduction in remedies.

[61] I do take into account that Ms Danielsen was offered a position with Amaltal on 22 October. Although she chose not to accept that position as she felt it was unsuitable for her in the stage of her pregnancy I am of the view that in the circumstances it would not be appropriate for me to exercise my discretion under section 128 (3) and order Amaltal to pay a greater sum than that provided for in section 128 (2) of the Employment Relations Act 2000.

[62] Another matter that Mr Stallard raised was whether Ms Danielsen would have got off the fishing vessel in any event after about three weeks when it returned to Nelson for a port call prior to heading down to Southern waters. Although that issue is probably not particularly relevant given my finding, I consider in any event the evidence about the matter is too speculative to be relied on to reduce the remedies. I do note the employment agreement provided notice of termination of one trip although the company may summarily dismiss an employee for misconduct.

[63] Ms Danielsen is entitled to lost wages between 16 July 2002 and 15 October 2002, a period of 13 weeks. There is the issue of how the lost wages are to be calculated. The most reliable evidence I have before me is Ms Danielsen's evidence that she received wages for the four month period 1 April 2002 to 31 July 2002 from Amaltal in the sum of \$15,410.97 gross. This figure is verified by the payroll information received from Amaltal. I have multiplied the figure of \$15,410.97 by 3 to arrive at a yearly gross income of \$46,232.91 which divided by 52 provides a weekly income of \$889.09. I have then multiplied \$889.09 by 13 weeks to arrive at \$11,558.17 gross which is lost wages.

[64] I order Amaltal Fishing Company Limited to pay to Helen Claire Danielsen the sum of \$11,558.17 gross being the reimbursement of lost wages under section 123 (b) of the Employment Relations Act 2000.

[65] There is also a claim for interest on lost wages from 16 July 2002 to the date of payment. In many respects this case has proceeded less than smoothly. There was a delay although understandable where Ms Danielsen was required to instruct Mr Zindel in the lodging of the statement of problem. Considering however the matter overall I consider it would be inappropriate to order that interest is payable on the lost wages.

Compensation for humiliation and loss of dignity

[66] Ms Danielsen was I accept distressed at the series of events that followed her disclosure to Captain Linton of her pregnancy. She described leaving the ship in tears on 16 July 2002 and the humiliation of the events on 17 July 2002. Ms Danielsen was very vulnerable at the time given her pregnancy. There was no real support offered by Amaltal when it was clear she was distressed. I am of the view that Ms Danielsen is entitled to compensation in the sum of \$7,000.00.

[67] I order Amaltal Fishing Company Limited to pay to Helen Claire Danielsen the sum of \$7,000.00 without deduction

Costs

[68] I reserve the issue of costs.

Postscript

[69] I heard medical evidence in this case and evidence about the difficulties with evacuations from boats in the event of medical emergencies. There may be some disappointment that the facts in this case have simply not required me to determine health and safety aspects as they concern a pregnant crew member. Each case however turns on its own facts. I accept Mr Atkinson's evidence that health and safety on board a vessel is a paramount consideration for Amaltal and the company has an excellent document called Vessel House Rules & Introduction to Safety Onboard for employees. A clearer company policy on pregnancy would no doubt be advantageous and provide some certainty.