

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 351
3186799

BETWEEN RUSSELL HEWINSON
Applicant

AND UNITED FISHERIES
LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Ramses Hunt, counsel for the Applicant
Penny Shaw, counsel for the Respondent

Investigation Meeting: 15 June 2023 at Christchurch

Submissions and other At the Investigation Meeting from Applicant and
information received: Respondent
22 June 2023 from the Respondent
28 June 2023 from the Applicant

Determination: 3 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Russell Hewinson was employed by United Fisheries Limited (United Fisheries) for over forty years, initially as an Auctioneer until his retirement in 2009, before returning as an Auctioneer Assistant in 2010 on what was labelled a “casual employment agreement”. Mr Hewinson claims that he was unjustifiably constructively dismissed in August 2022 after two incidents at the workplace or in the alternative that he was unjustifiably disadvantaged by United Fisheries’ actions. He further claims that United Fisheries unlawfully made deductions from Mr Hewinson by failing to provide sick leave for the week prior to Mr Hewinson’s termination.

[2] United Fisheries denies Mr Hewinson's claims and says that it genuinely believed that Mr Hewinson was a casual employee, it did not breach any duty towards Mr Hewinson that could have reasonably led to his resignation and it was unaware Mr Hewinson was claiming he was sick, so did not make deductions by failing to provide sick leave.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged on Mr Hewinson's behalf by himself and his wife Sharleen Hewinson. For United Fisheries, written witness statements were provided by its Chief Executive Andre Kotzikas, General Manager Michael Wall and three of Mr Hewinson's former colleagues Matt Tavai, Alan Davidson and Billy Edgerton. Messrs Hewinson, Hall, Edgerton and Kotzikas¹ and Mrs Hewinson answered questions, under affirmation or oath, from the Authority and counsel for Mr Hewinson and United Fisheries. Counsel also provided and spoke to written closing submissions at the end of the investigation meeting. Mr Tavai and Mr Davidson's written witness statements were taken as read and there were no questions for them from the Authority or counsel, due to the confirmation that they did not have any knowledge of the events related to the ending of Mr Hewinson's employment relationship.

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

The issues

[5] The issues requiring investigation and determination were:

- (a) Should Mr Hewinson's resignation be treated as a unjustified constructive dismissal caused by a breach of duty by United Fisheries?²

¹ Where this determination refers to Mr Kotzikas, that is a reference to Andre Kotzikas. Mr Kotzikas provided evidence to the Authority and was present at the investigation meeting. Loukas Kotzikas is referred to in this determination by his full name, where his actions are relevant to this determination. He did not provide evidence or appear before the Authority, but was involved in a number of interactions with Mr Hewinson that are relevant to the ending of Mr Hewinson's employment with United Fisheries.

² Mr Hewinson also claimed breaches of the duty of good faith by United Fisheries in its treatment of him. These claims have been considered as part of the claims of unjustified constructive dismissal caused by a breach of duty or in the alternative unjustified disadvantage.

- (b) If not unjustifiably constructively dismissed, was Mr Hewinson otherwise unjustifiably disadvantaged?
- (c) If United Fisheries' actions were not justified (in respect of dismissal or disadvantage), should compensation under s 123(1)(c)(i) of the Act be awarded?
- (d) If compensation is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Hewinson that contributed to the situation giving rise to his grievance?
- (e) Did Mr Hewinson receive sick leave entitlements from United Fisheries?³
- (f) If not, is Mr Hewinson entitled to payment for outstanding entitlements to sick leave?
- (g) Should penalties be imposed under s 75 of the Holidays Act 2003 (HA2003) and should any part of those penalties be paid to Mr Hewinson?
- (h) Should either party contribute to the costs of representation of the other party.

Context of matters conceded by United Fisheries and resolution

[6] Mr Hewinson initially claimed breaches of the HA2003 in relation to annual holidays and sick leave entitlements, and non-provision of holiday and leave records. At the case management conference for this matter concessions were made on behalf of United Fisheries that it had incorrectly treated Mr Hewinson as a casual employee and had incorrectly paid Mr Hewinson annual holiday pay with his (regular) pay in reliance on s 28 of the HA2003. Following this concession, I was advised at the commencement of the investigation meeting that annual holiday pay issues had been resolved between the parties and the claim for non-provision of holiday and leave records was withdrawn. These matters were not investigated further.

[7] This concession by United Fisheries also meant that it was agreed between the parties that I did not need to investigate whether Mr Hewinson was a casual or permanent employee, and the investigation meeting proceeded on the basis that he was a permanent employee. This concession simplified the investigation meeting process significantly and meant that it could focus on the events related to the ending of Mr

³ This issue was presented for Mr Hewinson as whether United Fisheries unlawfully made deductions from Mr Hewinson by failing to provide sick leave for the week prior to Mr Hewinson's termination.

Hewinson's employment with United Fisheries and the alleged non-payment of sick leave.

Was Mr Hewinson unjustifiably (constructively) dismissed by United Fisheries?

[8] A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. In this case Mr Hewinson claims that he was constructively dismissed as a result of two breaches of duty by United Fisheries.

[9] The two breaches claimed were:

- (a) non-provision of leave which constituted a failure to provide a safe workplace; and
- (b) failure to act in response to issues raised by Mr Hewinson.

The legal approach to a constructive dismissal

[10] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated that:⁴

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. ...

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[11] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:⁵

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

⁴ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

⁵ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

[12] Submissions for Mr Hewinson relied on the third situation described by the Court of Appeal in *Woolworths*, being that breaches of duty by United Fisheries led him to resign.

[13] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* set out the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.⁶ In determining that all the circumstances of the resignation must be examined not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[14] Mr Hewinson has the burden of establishing that the resignation was a dismissal.

What was the reason for Mr Hewinson's resignation?

[15] Mr Hewinson claims non-provision of leave by United Fisheries as the first breach of duty that caused his resignation.

[16] United Fisheries conceded that it did not provide Mr Hewinson with paid annual holidays or paid sick leave, based on its erroneous belief that Mr Hewinson was a "casual employee" and did not have access to these entitlements. United Fisheries' statement in reply indicated that if it had not met its obligations in this regard, then it was "more than happy to correct any mistakes" and it would pay what was due. As discussed at paragraph [6] above the parties were able to resolve issues related to annual holiday pay.

[17] Submissions for Mr Hewinson were that he believed that he was not entitled to sick leave due to being told this by Mr Kotzikas and that:

Given Mr Hewinson's admiration for André and the hierarchical management approach at [United Fisheries], he did not question the accuracy of André's statement. The unequivocal advice sick leave was not an option for him led Mr Hewinson to believe he would only be paid for the days he was present at work. ... The notion of requesting sick leave was inconceivable.

⁶ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

[18] In addition, Mr Hewinson says that this constituted a failure to provide a safe workplace. Submissions for Mr Hewinson were that:

... Mr Hewinson's loyalty to [United Fisheries] and André ... created a hazardous work environment when combined with the ingrained belief he had no entitlement to leave. Together, it led him to adopt a mentality of working through sickness and physical injuries. It was in his material interest to soldier through injury and illness, which, given his age, happened frequently. ...

However, love for one's work can only maintain a person for so long. The limitation of the soldiering-on approach is there would come a point where Mr Hewinson would incur an injury that surpassed his capacity to persevere without causing irreparable harm to himself. This critical injury materialised with the arrival of Loukas [Kotzikas], triggering a series of events that ultimately led to his departure from [United Fisheries].

[19] The second breach of duty that Mr Hewinson alleges caused his resignation was United Fisheries' failure to act in response to issues raised by Mr Hewinson with Mr Kotzikas. There was agreement that issues were raised, broadly the nature of those issues and the response from Mr Kotzikas, but a difference in views on what happened following the raising of issues.

Was Mr Hewinson's resignation caused by breaches of United Fisheries' duty in relation to non-provision of leave or failure to provide a safe workplace?

[20] An employer is required to behave in good faith towards an employee. The duty of good faith (under s 4 of the Act) requires that parties do not do anything that misleads or deceives each other or is likely to do so.

[21] The non-provision of leave entitlements is a situation which could have amounted to a breach of duty, particularly when there was reliance on a trusted representative of United Fisheries. Mr Hewinson's trust in and respect for Mr Kotzikas was clear and I consider it was reasonable that he would have followed Mr Kotzikas' advice that he was not entitled to be paid for sick leave and did not have entitlements to paid annual holidays.

[22] That is not the end of the enquiry though as the resignation must have been caused by the breach of duty. I am not convinced that Mr Hewinson's resignation was caused by the non-provision of leave by United Fisheries or that this constituted a failure to provide a safe workplace for the following reasons.

[23] Firstly, the first time that the non-provision of leave appeared to be raised was in the Statement of Problem. This suggests to me that Mr Hewinson was not aware of

the fact that he had been entitled to leave, but was not able to take it, until after he had resigned. In those circumstances, it is difficult to see that there could be a causal link.

[24] There was also evidence that Mr Hewinson wanted to work as much as he could and took pride in not taking time off work. I asked Mr Hewinson directly about why he didn't take time off work when he was sick or injured and he said that he didn't like to take leave and would even go against doctor's advice if he did not agree with it. The strong impression this left of Mr Hewinson was that he would follow his own views on when he should work.

[25] Mr Hewinson acknowledged that there were times when he had taken leave due to injuries and when recovering from heart surgery and that he had talked to Mr Kotzikas about his recovery from surgery. While the time he had off to recover may well have been unpaid and Mr Hewinson is likely to have not received his entitlement to paid sick leave at times, it does not appear to me that this was the cause of his resignation. Mr Kotzikas also provided evidence that he tried to encourage Mr Hewinson to take leave but even he was unable to convince Mr Hewinson to take leave, if he did not wish to do so. While I infer it was likely this would have been unpaid sick leave, there was some evidence of paid leave following Mr Hewinson being injured.

[26] Counsel for Mr Hewinson questioned Mr Wall about the importance of taking holidays as part of ensuring work-life balance. Mr Wall sensibly conceded that taking leave was important for that purpose and relieving stress. This line of questioning appeared aimed to show that the lack of paid annual holidays was enough to constitute a breach of duty. The challenge to this proposition is that Mr Hewinson's own evidence was that throughout his time with United Fisheries he would only ever take holidays for the annual shut-downs, as he thought that was what everyone did and he would never take leave during the year. While Mr Hewinson may now regret not taking annual holidays, there does not appear to be a causal link between his choice to not do so and his resignation.

[27] The failure to provide a safe workplace was also argued on behalf of Mr Hewinson to have arisen due to interactions with Loukas Kotzikas, which Mr Hewinson says made his working days increasingly miserable. I consider that this aspect of Mr Hewinson's claims overlaps with the assessment that follows about alleged breaches of United Fisheries' duty in relation to failure to act in response to issues raised by Mr Hewinson, so have considered it under that claim.

Was Mr Hewinson's resignation caused by breaches of United Fisheries' duty in relation to failure to act in response to issues raised by Mr Hewinson?

[28] Mr Hewinson says that his time at United Fisheries became less satisfying due to interactions with Loukas Kotzikas. There was some difference in evidence about the timeframes over which this occurred, as Mr Kotzikas said Loukas had worked for United Fisheries for over seven years, while Mr Hewinson was focussed in his evidence on the last three years of his working time. I do not consider this difference about timeframes to be overly relevant, due to the incidents that undoubtedly occurred at or near to the end of Mr Hewinson's employment with United Fisheries.

[29] This does provide, however, the context of escalating issues between Mr Hewinson and Loukas Kotzikas. Messrs Hewinson, Edgerton and Kotzikas all provided evidence that supported the presence of a degree of conflict between Mr Hewinson and Loukas Kotzikas, which was also supported by the untested evidence of Mr Tavai and Mr Davidson.

[30] Mr Hewinson described this as a building sense of frustration, which led to him raising issues with Mr Kotzikas on a number of occasions. It appeared from this that Mr Hewinson clearly felt that Loukas Kotzikas was deliberately and persistently arguing with him, and that he referred to there being one time only when Mr Kotzikas "had my back regarding Loukas."

[31] Mr Hewinson, however, provided inconsistent evidence about how he perceived Loukas Kotzikas' position at United Fisheries. On the one hand he said that:

There was significant tension because it was expected that he was just to be one of us, but he was also a Kotzikas. Everyone knew what that last name meant, including Andre. ...

Everyone knew this was a family business and that Loukas would play an important role in the future of the business. I initially respected the fact that he was working with the guys on the ground. However, it soon became clear that he did not know what he was talking about but wanted us all to bend to how he wanted things to be done.

[32] On the other hand Mr Hewinson affirmed in response to questions from me that he was clear that Mr Kotzikas was the boss and Loukas Kotzikas was just a worker.

[33] Mr Kotzikas gave evidence that in his role as Chief Executive of United Fisheries he has complete control over the operations of the business, which included direct control of the auction room at the time of the incidents when Mr Hewinson's employment came to an end and for some years prior. Mr Kotzikas said that he

considered Loukas Kotzikas to be a worker who he would treat like any other and that he would back who was right on an issue, referring to issues (presumably including the same situation referred to by Mr Hewinson at paragraph [30]) where he backed Mr Hewinson over his son. Mr Kotzikas acknowledged, however, that he enjoyed working more closely with his son, seeing him develop and trying to achieve Mr Kotzikas' standards, which he would have had greater opportunity to understand from the combination of work and family interactions.

[34] Mr Edgerton's evidence (corroborated by Mr Davidson's untested evidence) was that other workers considered Loukas Kotzikas was being developed to take more responsibility. This was not an unreasonable conclusion to reach, which supports Mr Hewinson's perspective, despite Mr Kotzikas' evidence that he would back who was right. This conclusion is supported by Mr Edgerton's confirmation that his advice to Mr Hewinson about his struggles with Loukas Kotzikas was to "back down and let Loukas do the things the way he wanted to do."

[35] Mr Edgerton also gave evidence that:

Russell wanted [to] be the boss and Loukas wanted to do things a certain way, Russell was always keen to answer back. I didn't see there was a personal vendetta by Loukas against Russell, Russell just thought if it wasn't done his way it was done the wrong way.

[36] Under questioning from counsel for United Fisheries Mr Hewinson was very hesitant to accept that Loukas Kotzikas could have good ideas for how the auction room could run and presented as hesitant to consider change. This strongly supported that he was struggling with the presence of an increasingly confident Loukas Kotzikas, who other workers had chosen to accept or not confront, but Mr Hewinson was unable to follow that approach, even when counselled to do so. Most telling was Mr Hewinson's response to the proposition that he didn't want to take on board others' ideas that "when a 21 year old is trying to tell an 80 year old what to do, that's a different story."

[37] Mr Hewinson and Mr Kotzikas gave broadly consistent accounts of having discussed the issues that Mr Hewinson was having interacting with Loukas Kotzikas, with Mr Kotzikas' evidence being that:

I did tell Russell that he would need to find some patience and find a way with working with Loukas and accepting some changes. Russell said he didn't think he could work with him and commented that maybe it was his time to finish. This wasn't long before he surrendered his keys and never returned.

[38] I consider that this interaction between Mr Hewinson and Mr Kotzikas was sufficient to place United Fisheries on notice that there were issues that Mr Hewinson wanted resolved in the workplace. I am not convinced that Mr Hewinson elevated these issues to the status of bullying, rather it appears to me that the underlying interpersonal issues involved both Mr Hewinson and Loukas Kotzikas asserting themselves and refusing to back down. This does not change my view, however, that there was sufficient notice to United Fisheries that interpersonal issues were present and that action was needed to resolve those issues.

[39] There was also consistent evidence from all witnesses that the workplace at United Fisheries, particularly in the auction room, was one where robust or coarse language was used and behaviour could be assertive. Mr Hewinson acknowledged that he could be aggressive in his own language or in asserting his view but considered this was generally taken with a grain of salt. This acknowledgement does not change the obligation that United Fisheries had, once on notice that there were interpersonal issues and resignation was being contemplated in response to those issues, to take some action to address those issues.

Were the two incidents at the end of Mr Hewinson's employment breaches of United Fisheries duties?

[40] Again broadly similar accounts of these incidents were provided by Mr Hewinson and Mr Kotzikas. In summary, Mr Hewinson and Loukas Kotzikas had differences of views over issues related to the auction room and placement of machinery, with robust language exchanged, where neither appeared to be willing to back down. Mr Hewinson was firmly of the view that he was in the right in both incidents but did not feel supported in his view. I do not consider I need to make findings in detail about what occurred during these incidents, given what was agreed had occurred.

[41] The first incident resulted in Mr Hewinson leaving the United Fisheries auction room, which he says was to cool down, and not returning to work for the remainder of the week. While there is a discrepancy between the dates that Mr Hewinson and Mr Kotzikas say that this occurred, I do not consider that is material, as it is common ground that Mr Hewinson left the workplace and did not return for a week.

[42] Mr Hewinson's evidence of his reasons for leaving the workplace was:

At that moment, I simply had enough. I did not get into an argument with [Loukas Kotzikas] or make a scene. I just felt that I needed to remove myself from that situation quickly. I walked out and went straight home. Out of self-respect, I could not stand there for one moment longer and be talked to like that. I know that leaving work without authorisation is not allowed. It is something that I had never done in over four decades. However, something inside me just broke. I could not be in that room one second longer. I could not exactly go to Andre and complain.

[43] Mr Hewinson provided evidence that he got up each day at the normal time but couldn't handle going to work. Against the history of Mr Hewinson's work attendance, this appeared to have been a genuine indication that he was at breaking point, although this was not communicated to United Fisheries. Mr Hewinson says that the only contact he had after this first incident was a text message advising him of the start time for work the next day and there was no dispute from Mr Kotzikas that he did not follow-up with Mr Hewinson. I also note that Mr Hewinson did not appear to have reached out to Mr Kotzikas or anyone else at United Fisheries during this week.

[44] Mr Hewinson then returned to work the following Monday, where there was again an incident between him and Loukas Kotzikas. Mr Kotzikas says that he was monitoring the situation and it was common ground that he called Mr Hewinson over and they had a conversation. Mr Hewinson says Mr Kotzikas said "listen, Russell, you either go with the flow, or you do what you did last Monday." Mr Kotzikas says he told Mr Hewinson "... he needed to choose to either work cooperatively with the others or choose to do the same as he had the previous week." I do not consider these accounts are materially different in meaning or that I need to make a finding about whether this conversation was or could have been overheard by other workers.

[45] Following this it was agreed that Mr Hewinson handed over his keys, left the workplace and did not return. Mr Kotzikas says that he had the impression that Mr Hewinson had quit and "that was the last I heard or saw of him until a Statement of Problem arrived on my desk" alleging constructive dismissal, with no opportunity for United Fisheries to resolve the problem.

[46] Mr Hewinson's view of the situation was:

As I walked out, it dawned on me that whatever respect Andre had for me was gone. I could not work for a company that no longer respected me. So that was my last day working at United Fisheries. I have not had any direct communications with any United Fisheries staff since.

[47] Both Mr Hewinson and Mr Kotzikas described where this matter has gotten to as a kick in the guts and there is clear disappointment from both parties over how a long and generally successful career has ended.

[48] The key question for me to determine remains whether Mr Hewinson's resignation was caused by a breach of duty by United Fisheries in relation to those incidents. I find that it was due to the fact that United Fisheries (and Mr Kotzikas in particular) was on notice that there were interpersonal issues between Mr Hewinson and Loukas Kotzikas which may need intervention, Mr Kotzikas was monitoring those issues and actively intervened when a second incident occurred, and then there was a failure by United Fisheries to follow-up when Mr Hewinson's response to that intervention was to resign.

[49] Submissions for United Fisheries were that Mr Kotzikas had given advice that was very sensible and proactive, and that there was no breach. While the initial advice to "find a way with working with Loukas and accepting some changes" seems quite reasonable, I do not agree that the response to the second incident was what a fair and reasonable employer would have done and consider that was a key aspect of the breach of duty by United Fisheries.

[50] A fair and reasonable employer would have followed up with Mr Hewinson's resignation, after a reasonable cooling-down period, to discuss what had occurred and to clarify what options Mr Hewinson had, in light of what Mr Kotzikas had said to him. United Fisheries failure to do so was a breach of its duty to him.

[51] Potentially even more problematic for United Fisheries was Mr Kotzikas' candid statement, in response to a question from me, that the reason he did not reach out to Mr Hewinson was that:

He was clear that he had made his decision to once and for all leave employment at United Fisheries. That being his choice, I was happy to accept.

[52] While I understood the rationale behind Mr Kotzikas' position, given his understanding that Mr Hewinson was a casual employee, I do not accept that his actions reflected those of a fair and reasonable employer. While Mr Hewinson equally could have reached out following his resignation, the position of Mr Kotzikas and the respect and deference that Mr Hewinson showed to Mr Kotzikas means that I would have placed more expectation on him to follow-up on this situation.

Was Mr Hewinson's resignation reasonably foreseeable?

[53] Having reached the above finding, I am required to consider whether Mr Hewinson's resignation was reasonably foreseeable.

[54] I have noted at paragraphs [37] and [38] above discussions between Mr Hewinson and Mr Kotzikas that I consider placed United Fisheries on notice of the potential of Mr Hewinson resigning if the interpersonal issues he raised were not addressed. It was Mr Kotzikas' evidence that this occurred not long before Mr Hewinson's resignation.

[55] At paragraphs [40] to [47] I have discussed the two incidents at the end of Mr Hewinson's employment, which culminated in his resignation. Mr Kotzikas said he was monitoring the situation and that was the reason for his calling Mr Hewinson aside. Mr Kotzikas stood by the choice that he says he provided Mr Hewinson, expecting that he would either comply with a reasonable request or that he might take time to cool off and "hopefully blow out what was in his system".

[56] At the investigation meeting Mr Kotzikas said that "he wouldn't like it to be thought that these were the only two times [Mr Hewinson] had walked off and there were numerous examples." I provided an opportunity for further evidence to be provided after the investigation meeting to support this, but no additional records to support this were provided. Mr Hewinson provided a further statement where he acknowledged one other example when he may have walked away from the workplace, following a disagreement with Mr Kotzikas, which he thought may have occurred in 2016. That instance appeared to have been resolved without further concern and I am not convinced that this creates a pattern of behaviour where Mr Hewinson regularly needed to take time to cool off.

[57] In the circumstances described above and given the nature of breaches of duty that I have found on the part of United Fisheries, I consider it entirely foreseeable that Mr Hewinson would resign.

[58] Given this, I find that Mr Hewinson was unjustifiably constructively dismissed by United Fisheries. I do not need, therefore, to further consider whether Mr Hewinson was unjustifiably disadvantaged by United Fisheries.

What remedies should be awarded to Mr Hewinson in relation to his unjustified constructive dismissal?

[59] Having determined that Mr Hewinson was unjustifiably constructively dismissed, I need to consider what remedies should follow. Mr Hewinson has sought compensation for hurt and humiliation under s 123(1)(c)(i) of the Act. Submissions for Mr Hewinson were that the harm to Mr Hewinson was in line with cases where \$25,000.00 has been awarded. Counsel for Mr Hewinson expressly stated that compensation in the form of lost wages was not being sought, so I have not considered that remedy.

[60] Mr Hewinson provided evidence that “How my career ended has been hard to come to terms with” and he was “pissed off it happened as he thought he would be there to the end of his days.” He said he was still waking at the same time of day, not used to not working and would never be the same.

[61] Mrs Hewinson provided evidence that while she was initially relieved that Mr Hewinson had left his employment, she now thought he had changed and this had placed pressure on their marriage. Her witness statement concluded by saying:

... for Russell, the reality of losing his job did not set in until a few days later. Russell was upset and lost, then realised no income was coming in, his self-esteem was taken away from him. Russell gave his merit and soul to the job. It was part of his life. Till today he struggles to understand why he was treated the way he was treated. I think closure is something he really needs to move on. There is a deep sense of betrayal, especially from Andre.

[62] I asked Mr Hewinson about his wife’s observations of the impact on him and he was significantly upset by this and was unable to provide a comment on what she had seen. I took his reaction as an acknowledgement of what Mrs Hewinson had said and the pain that she had observed him in.

[63] United Fisheries submission was that Mr Hewinson’s evidence did “not show a significant level of distress and would only support an award at the lower end of the spectrum.”

[64] I find that Mr Hewinson’s unjustifiable constructive dismissal had a significant impact on Mr Hewinson and that an award of compensation is appropriate. Subject to any contribution, Mr Hewinson is entitled to payment of compensation in the sum of \$20,000 under s 123(1)(c)(i) if the Act. In reaching this figure I have taken into account other comparable cases.

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Hewinson that contributed to the situation giving rise to his grievance?

[65] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Hewinson that contributed to the situation giving rise to his grievance.

[66] United Fisheries' submission was that Mr Hewinson's "conduct in this matter was blameworthy and contributed to his dismissal to a significant extent" concluding that "If the applicant had worked more cooperatively with others the incidents would not have occurred."

[67] Submissions for Mr Hewinson were that there was no contribution "to the circumstances which led to his employment ending" and that he "appropriately put [United Fisheries] on notice."

[68] I consider that Mr Hewinson has contributed in part to the circumstances that led to his unjustified constructive dismissal, due to his being partially responsible for the interpersonal issues he had with Loukas Kotzikas, his reaction to those issues and his failure to make contact with United Fisheries either between the two incidents at the end of his employment or after his resignation. While I have found at paragraph [52] that Mr Hewinson could have reached out to Mr Kotzikas after his resignation, I also found that I would have placed more expectation on Mr Kotzikas to follow-up on that situation.

[69] Based on the above considerations I conclude Mr Hewinson did contribute to the ending of his employment in a way that warrants reduction of remedies. I consider 10% appropriate.

Did Mr Hewinson receive sick leave entitlements from United Fisheries?

[70] This claim was presented on behalf of Mr Hewinson as United Fisheries having unlawfully made deductions from him by failing to provide sick leave for the week prior to his termination.

[71] No evidence was provided that Mr Hewinson sought sick leave or gave United Fisheries the opportunity to consider that he may have been sick at the time. While this may be explained by the mistaken belief that he was not entitled to sick leave, which

he should not be penalised for, Mr Hewinson was also not communicative with United Fisheries during that week, as discussed at paragraph [43].

[72] In these circumstances I do not consider it appropriate to consider this claim further and decline to award remedies related to sick leave entitlements.

Should penalties be imposed under s 75 of the HA2003 and should any part of those penalties be paid to Mr Hewinson?

[73] Mr Hewinson is seeking penalties for United Fisheries' alleged breaches of its obligations under the HA2003 relating to failing to provide paid annual holidays, failing to pay annual holiday pay in Mr Hewinson's final pay, failing to provide sick leave entitlements and failing to record sick leave entitlements.

[74] United Fisheries accepted that it had not provided these entitlements, but claims any breaches were unintentional due to its genuine and reasonable belief that Mr Hewinson was a casual employee. United Fisheries says that it remedied the breaches when they came to its attention and has made a substantial payment to Mr Hewinson on that basis.

[75] As noted in paragraph [6] prior to the investigation meeting annual holiday pay issues were resolved between the parties and the claim for non-provision of holiday and leave records was withdrawn. Mr Hewinson maintained however that a penalty was appropriate in relation to these breaches.

[76] Penalties are provided under s 75 of the HA2003 for the acknowledged breaches associated with United Fisheries incorrect reliance on s 28 to pay Mr Hewinson annual holiday pay with his (regular) pay. Given my finding above in paragraph [72] in relation to sick leave entitlements, I do not consider it appropriate to consider penalties for those alleged breaches. For a company the maximum penalty in both breaches related to annual holidays is \$20,000.

[77] In deciding whether to impose a penalty, and if I decide to, deciding how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*.⁷

⁷ *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143.

[78] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty, including:

- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[79] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[80] United Fisheries have now remedied Mr Hewinson's claims for annual holiday pay. While there was some back and forth to reach agreement on the amount that Mr Hewinson was entitled to, I consider there was a genuine acknowledgement by United Fisheries that it had breached Mr Hewinson's entitlements in treating him incorrectly as a casual employee and United Fisheries acted on advice about his entitlements when Mr Hewinson raised a claim for unpaid annual holidays entitlements. Once the issue was raised I am satisfied United Fisheries acted in good faith, based on the advice it received, and continued to engage to ensure it fully meet Mr Hewinson's entitlements.

[81] I am satisfied that United Fisheries breaches were inadvertent, based on the misapprehension that Mr Hewinson was a casual employee. As noted in paragraph [26] Mr Hewinson's own evidence was that throughout his time with United Fisheries he would only ever take holidays for the annual shut-downs, as he thought that was what everyone did and he would never take leave during the year. This counts against there having been a loss or damage suffered by Mr Hewinson, due to the payment of his annual holiday pay with his (regular) pay. Mr Hewinson has now received his full entitlements to annual holiday pay.

[82] In the circumstances of this case I find the breaches were not intentional and a penalty is not warranted. Mr Hewinson's application for penalties to be imposed is unsuccessful.

Summary of outcome

[83] I have found that Russell Hewinson was unjustifiably constructively dismissed by United Fisheries Limited.

[84] As a result I order United Fisheries Limited to pay Russell Hewinson compensation in the amount of \$18,000 under s 123(1)(c)(i) of the Act. This amount reflects a reduction in remedies of 10% due to Mr Hewinson's contribution to the ending of his employment in a way that warrants reduction of remedies under s 124 of the Act.

[85] Mr Hewinson's unjustifiable disadvantage claim was presented as an alternative, so does not need a further finding. Mr Hewinson's claims for unpaid sick leave and for penalties were not successful.

Costs

[86] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[87] If they are not able to do so and an Authority determination on costs is needed, Mr Hewinson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum United Fisheries would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[88] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸ As the investigation meeting for this matter took a full day, my preliminary view is that the notional daily rate is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

⁸ See www.era.govt.nz/determinations/awarding-costs-remedies.