IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 97
5458213

	BETWEEN	STUART HURST Applicant
	A N D	WARTSILA AUSTRALIA PTY LIMITED First Respondent
		WARTSILA NEW ZEALAND LIMITED Second Respondent

Member of Authority:	Peter van Keulen
Representatives:	Luke Acland, Counsel for Applicant Stephen Galbreath, Counsel for First and Second Respondent
Investigation Meeting:	2 and 3 February 2017 at Nelson
Submissions Received:	3 February 2017 from both parties 13 February and 6 March 2017 from Applicant 27 February 2017 from Respondents
Date of Determination:	15 June 2017

DETERMINATION OF THE AUTHORITY

A. Mr Hurst was employed by Wartsila New Zealand Limited.

B. Wartsila New Zealand Limited unjustifiably dismissed Mr Hurst.

C. Wartsila New Zealand Limited is to pay Mr Hurst the following sums (which includes the deduction for 30% contribution) by way of remedies:

(a) $7,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

(b) $37,443.18 pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000

D. I do not have jurisdiction to determine the counterclaim lodged by Wartsila Australia Pty Limited.

E. I reserve costs with a timetable set for submissions if required.

Employment relationship problem

[1] Wartsila Australia Pty Limited (WAU) dismissed Stuart Hurst because it believed he had acted in an unethical manner and in breach of its code of conduct by sending harmful emails to Wartsila North America (WNA) and a customer. It says this behaviour discredited and undermined it such that it caused WNA to stop providing business to it. It also complained that Mr Hurst did not take responsibility for his actions, leaving it no choice other than dismissal.

[2] Mr Hurst admitted sending the emails and accepted that in some cases this was inappropriate. He disputes the conclusion that this was serious misconduct and he says the process by which WAU reached the conclusion, that this was serious misconduct and justified dismissal, was flawed. As a result, he claims WAU unjustifiably dismissed him and he seeks remedies from WAU for that unjustified dismissal.

[3] WAU says its dismissal of Mr Hurst was substantively justified and the disciplinary process used to effect that dismissal was fair. WAU also claims that it has suffered a financial loss because of Mr Hurst's actions, that loss being the business it would have received from WNA and it claims this loss from Mr Hurst.

[4] I have issued this determination later than the three-month period allowed after receiving the last documents from the parties. I record that the Chief of the Authority has decided under 174C(4) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing this written determination later than the latest date specified in s 174C(3)(b) of the Act.

Preliminary matter

[5] Mr Hurst raised his personal grievance against WAU and lodged his statement of problem against WAU, as he thought WAU was his employer. On the face of it, this appeared to be correct. Mr Hurst had information that supported this conclusion. For example, in a letter dated 22 March 2010 WAU stated *I wish to confirm your position with Wartsila Australia Pty Ltd has changed to Senior Service Engineer – Grade 1 effective 1st March, 2010.*

[6] WAU then engaged with Mr Hurst over his personal grievance by, amongst other things, attending mediation and it responded to the statement of problem by lodging a statement in reply. In the course of conducting its response to the personal grievance, WAU did not assert that it was not Mr Hurst's employer and it actually led an affirmative defence stating that it had justifiably dismissed Mr Hurst.

[7] It was surprising, therefore, to have WAU's first witness, Andrew Segula, who is a Human Resources Manager for WAU, state that Mr Hurst was employed by Wartsila New Zealand Limited (WNZ).

[8] In order to deal with this new issue in a manner that was just and fair to both parties and WNZ, I joined WNZ as a second respondent to the matter and indicated to the parties that I would consider the evidence and determine as part of my investigation whether WAU or WNZ was Mr Hurst's employer.

[9] This approach is appropriate because:

(a) WNZ is a wholly owned subsidiary of WAU.

(b) Only employees of WAU were involved in the termination of Mr Hurst's employment. Therefore, only WAU employees could advance WNZ's position and WNZ's defence of Mr Hurst's grievance would be no different to WAU's stated position.

(c) If WNZ was Mr Hurst's employer then I can logically treat WAU as acting on its behalf both in dismissing Mr Hurst and in advancing its defence to his grievance.

[10] I then directed that the statement in reply lodged by WAU be treated as a statement in reply for both respondents.

[11] In order to resolve the issue of which entity employed Mr Hurst I have considered the structure of relevant companies in the Wartsila group of companies, the status of both WAU and WNZ in New Zealand as registered companies, how WNZ and WAU operated and the information and documents that Mr Hurst received in the course of his employment.

[12] WAU and WNZ are part of the Wartsila group of companies. The parent company of the group is a Finnish entity listed on Nasdaq Helsinki, Wartsila Corporation. WAU is a wholly owned subsidiary of Wartsila Corporation.

[13] The register held by the New Zealand Companies Office shows that WNZ was registered as a New Zealand Limited Company on 13 March 2001. The sole shareholder of WNZ is WAU.

[14] WAU was registered in New Zealand as an Overseas ASIC Company on 9 April 1999 but it was then removed from the register on 8 January 2013. WAU is registered with the Australian Securities & Investment Commission as a proprietary company limited by shares.

[15] Mr Segula's evidence was that WNZ employs various employees based in New Zealand but many of those employees carry out work for WAU.

[16] As I have already indicated, Mr Hurst had documents and information that suggested WAU was his employer. However, there was additional information provided as part of my investigation that indicated WNZ was his employer. For example, Mr Hurst's pay slips were issued in the name of WNZ and Mr Hurst's email signature was, *Stuart Hurst, Senior Service Engineer, Wartsila New Zealand Ltd ….*

[17] It appears that WAU managed Mr Hurst's employment as he carried out work for WAU. There may have been some confusion created by WAU as result of this day-to-day management. However, the evidence is that WNZ employs New Zealand based employees. There are policies and an employment agreement for WNZ and its employees and WNZ administers the payroll. I conclude that Mr Hurst must have been employed by WNZ at the time he was dismissed.

The issues for unjustified dismissal

[18] For an unjustified dismissal claim where the dismissal is not in dispute there are two broad issues to consider:

(a) Did the employer follow a fair disciplinary process in coming to the conclusion to dismiss; and

(b) Was the decision to dismiss substantively justified?

[19] Sections 4(1A) and 103A of the Employment Relations Act 2000 (the Act) inform the question of whether WAU conducted a fair disciplinary process. Based on the facts in this case and the relevant law, the matters I must consider are:

(a) Did WAU investigate the allegation of serious misconduct sufficiently;

(b) Did WAU outline the allegation, explain the possible implications of a finding of serious misconduct and give all the information it had that was relevant to the allegation of serious misconduct to Mr Hurst for him to consider and respond;

(c) Did WAU give Mr Hurst a reasonable opportunity to respond to the information and the allegation of serious misconduct before it made its decision on whether the behaviour amounted to serious misconduct and that this justified dismissal;

(d) Did WAU consider properly any explanation given by Mr Hurst before it made its decision that the conduct amounted to serious misconduct and justified dismissal;

(e) Was WAU required to give Mr Hurst an opportunity to respond to the decision to dismiss him and if it did so, was this an adequate opportunity; and

(f) If there were any failings by WAU in the steps outlined above, does that render the disciplinary process unfair?

[20] The issue I must consider on the question of substantive justification is, was the gravity of the misconduct, including any effects of it and/or the circumstances of

the misconduct including any mitigating factors, such that dismissal was not a decision a fair and reasonable employer could have come to.

Facts giving rise to the unjustified dismissal grievance

Background

[21] Wartsila Corporation designs, manufactures and provides equipment and systems for marine propulsion and energy generation. As part of this specialism, it does engineering work on large maritime vessels such as cruise ships and at power plants.

[22] WNA, which is also a wholly owned subsidiary of Wartsila Corporation, has contracts with global cruise line customers to perform engineering and maintenance work on cruise ships. WNA subcontracts with WAU for WAU to perform maintenance work required under its contracts in Australia, New Zealand and the Pacific Island region.

[23] Mr Hurst was employed from August 2006 as a service engineer. He became a senior service engineer based in Nelson from 1 January 2009. Mr Hurst's role was to attend to engineering and maintenance tasks on cruise ships in the area covered by WAU.

[24] In February 2014, Mr Hurst attended a cruise ship, Sea Princess, to carry out an overhaul of one of the main propulsion generator engines. This work was done on behalf of WNA for one of its customers, Princess Cruises.

[25] In the course of undertaking this work in February and March 2014, it is clear that Mr Hurst had concerns about the support he received from WAU, the preparation for and coordination of the work that was to be undertaken and some mechanical failures. Examples included:

(a) The first area of concern that Mr Hurst had was WAU's failure to properly plan and coordinate the work required on the Sea Princess. Prior to attending the Sea Princess, Mr Hurst prepared a list of necessary equipment to assist with carrying out the tasks required. He requested in the normal way for this material to be sent directly to the Sea Princess by WAU. It became clear to Mr Hurst as the

commencement date for the work became closer that most of the consumables he had requested from WAU had not been organised. As a result, he was forced to source some of the items before attending the Sea Princess. And Mr Hurst had to source other items at various ports during the voyage.

(b) During one trip when Mr Hurst went to obtain materials, a tourist bus hit the taxi he was in. This caused an injury to him.

(c) A further example of Mr Hurst's frustration was the lack of coordination by WAU in informing Princess Cruises who would be attending in Auckland and when. He says this resulted in complications for gaining security clearance and accommodation on board the Sea Princess. He also says this delayed the start of the work he was to undertake.

(d) Mr Hurst complained that liquid nitrogen required for the work he was undertaking either leaked out during the voyage or had not been stocked to the required quantity. Whilst WAU tried to order further liquid nitrogen, failure to coordinate that with Princess Cruises meant it had to be cancelled. Halfway through the work being undertaken by Mr Hurst, the original supply of liquid nitrogen ran out. Mr Hurst had to source liquid nitrogen himself when the Sea Princess stopped in Wellington.

(e) When the Sea Princess departed from Brisbane on 16 February 2014, a diesel generator failed. A large explosion occurred and various critical alarms were activated. This resulted in one of the engines having to be shut down.

Behaviour complained of – five emails

[26] It is against this background of events that Mr Hurst chose to express this frustration and the concerns he had about what had occurred in various emails. These emails led to the disciplinary process and subsequent termination of his employment.

[27] Mr Hurst says that WAU had not reviewed highly relevant information from previous overhaul reports of the Sea Princess. Further, this information, which was

vital for machining and spare part procurement, was not available and this caused delays to assembly of the engine. There were historical machining issues that meant there were customised non-standard sleeve inserts in some lines and the engine. Mr Hurst was not aware of this anomaly and it only became apparent at an advanced stage in the machining process. As a result, the machining work had to be repeated, resulting in additional time being lost and delaying the assembly of the engine.

[28] What followed from these events was an email exchange with Greg Jackson, Princess Cruises' technical superintendent.

[29] On 1 March 2014 at 11:11am Mr Jackson emailed various personnel at WAU stating:

> All,
>
> Please see message below from Sea Princess.
>
> Incredibly the entablature was machined without checking if it had been previously machined and if the insert rings supplied were the correct size. We now have an urgent requirement for two oversize insert rings for the upper lining landing.
>
> These are required soonest so as to not delay the completion of the overhaul in the specified time. If this overruns due to this I will be contesting any extra costs associated.

[30] In response to Mr Jackson's email, Mr Hurst sent an email on 1 March 2014 at 12:54 pm (the First Email). This email was a group email to various people at WAU, WNA and also WNA's customer, Princess Cruises. In this email, Mr Hurst stated:

> Hello Greg, I would like to if I may add my input into this debacle.
>
> Quote "incredibly the entablature was machined without checking if it had been previously machined and if the insert rings were the correct size" unquote.
>
> No information of any kind was supplied to the machinist regards this entablature machining. Once the engine had been dismantled it was obvious that all top landings had been machined previously. This was notified to all concerned. Again no information was supplied regards previous machining.
>
> Credibly the information was there but no one involved in the planning process of this machining exercise bothered to check any previous history. The chief engineer/senior first engineer found what was required within minutes still within the vessel's archives.
>
> I hope my comments clear up any misconception that may be drawn from your above comment that the guys at the sharp end should carry

> any blame for something which could/should have been avoided at the planning stage.

[31] Mr Jackson then responded to the First Email with two emails. The first was a direct reply to Mr Hurst copying in the various recipients. His email stated:

> Stewart,
>
> Fully agree that this could be picked up at the planning stage.
>
> However all the information you claim to have not been supplied with is in the previous overhaul reports, all of which are readily available from Wartsila and on board.
>
> I do not believe that my expectation that the senior service engineer in attendance would have read the previous overhaul reports, is too much to ask for.
>
> PCLA are paying huge amounts for the attendance of two service technicians and two machinists.
>
> What is the point in employing "specialists" if they can't even be bothered to familiarise themselves with the history of the DG.

[32] The second email Mr Jackson sent was directed to management within WAU and WNA. This email stated:

> Please ensure that a different senior service engineer is planned to attend for DG#2. To my mind he is the senior Wartsila rep on board and is clearly unable to acknowledge any fault.
>
> We do not need people like this on our vessels.

[33] There was no evidence of any further action taken by Mr Jackson or Princess Cruises to have Mr Hurst removed from the Sea Princess. Nor was there any evidence of investigation by WNA or WAU or even discussion with Princess Cruises, about Princess Cruise's concerns and what steps WNA and WAU might need to take.

[34] On 17 March 2014, Mr Hurst sent an email attaching a report for work he was doing on the Sea Princess to Hardik Patel of WAU (the Second Email). In the Second Email, Mr Hurst described the report as *grim reading* and that *to add more salt to the wound*, an item supplied by WAU's own workshop was faulty. The Second Email was copied to Princess Cruises and various personnel within WAU.

[35] Mr Patel then forwarded the Second Email to Spencer Weber, a Field Service Coordinator at WNA. On 19 March 2014, Mr Spencer then sent the Second Email on

to Andrea Jacintho, General Manager – QEHS in WNA, who has responsibility for dealing with customer complaints. Mr Weber's email stated:

> Hey Andrea
>
> Looks like there is some Re-work to be Done that we have from Australia.
>
> We hired Wartsila Australia to OH DG#3 on the Sea Princess. Seams [sic] there are some quality issues on their end that are causing re-work. We will have US persons on site during the Next OH and will need to finish these repairs for them. They will be issuing a PO for our time on this so no out of pocket costs to WNA but to the customer this is more delays and setbacks before the next overhaul can begin. This is why we have been requested by the customer not to have the lead from WAU return. For this reason we are using WNA manpower to lead the next job.

[36] Ms Jacintho then registered Mr Weber's email as a complaint for Princess Cruises and completed a Non-conformity notification identifying the complaint. The form recorded the notification as:

> Leak on two units after Wartsila Australia OH of DG#3.
> Also, field service engineer complaint against the quality of workshop service in Sidney [sic].

[37] Ms Jacintho sent this Non-conformity notification to Mr Segula at WAU on 20 March 2014.

[38] Mr Hurst sent a further email on 18 March 2014 to Mr Patel as well as to Mr Weber at WNA and Princess Cruises (the Third Email). The Third Email appears to be in order to ensure that the further work required would be completed without any issues that occurred with the previous work. The Third Email stated:

> Senior first engineer would like confirmation that all co-ordination regards the upcoming task has been completed.
>
> Areas which were neglected with regards DG#3 need to be avoided.
> Chief suspect on that agenda was improper reference back to previous work carried out on the engines.
> Can you make sure that there is no surprises lurking to bite the next candidate where it hurts.
> Other area is to establish is that all spare parts required related to scope of work have been sourced.
>
> Even simple things like informing the client who is turning up from WAU, and when would also be a great help.

[39] On 19 March 2014, Mr Hurst forwarded a job completion sign-off and questionnaire to Princess Cruises (the Fourth Email). The Fourth stated that the form did not allow the opportunity to comment on the organisation side of things.

[40] On 21 March 2014, Mr Hurst sent another email about further overhaul work (the Fifth Email). Mr Hurst sent the Fifth Email to Andrea Santoni, a Senior Service Engineer with WNA who was taking over Mr Hurst's role in respect of the upcoming service on DG#2. It appears to have been sent in order to let WNA know about issues still existing from the previous overhaul job. The Fifth Email included the line *[a]s my experience with Z40 engines can be written on the back of a cigarette packet I am now a little wiser.*

WAU reaction to the five emails

[41] WAU says the Second Email contained information about warranty issues and should have remained internal to WAU.

[42] WAU believed the Third Email was critical and highly damaging to WAU. It complains that Mr Hurst's email was critical in that he uses words such as *can you make sure there are no surprises lurking to bite the next candidate where it hurts*.

[43] WAU complains that the Fourth Email suggests there was a problem on the organisation side of things and that WAU was not really interested in the questionnaire or customer feedback. Mr Hurst also drew attention to the uncompleted work at that time.

[44] WAU complains that the Fifth Email is unnecessarily critical of it and identifies that Mr Hurst has limited experience with the engines he was working on.

Disciplinary process

[45] Having received the complaint notification overnight of 20 March 2014, Mr Patel spoke to Mr Weber about the issues. I did not have any direct evidence from either Mr Patel or Mr Weber about what they discussed but it was clear from Mr Rothwell's evidence that Mr Patel believed that WNA was going to withdraw any further work on the Sea Princess from WAU. Hearing that WNA would not be using it to do the next overhaul, Mr Rothwell decided to commence a disciplinary process

with Mr Hurst. Mr Rothwell sent Mr Hurst an email dated 21 March 2014 setting out WAU's concerns.

[46] The disciplinary email of 21 March 2014 raised the issues that WAU had with Mr Hurst's emails. It is clear that WAU has no issue with Mr Hurst raising his concerns about the work undertaken but its concern is that the issues should not have been copied to WNA or the customer. Amongst other things the email states:

> In your emails you have involved both the direct customer and our network customer on subjects that are internal. We know you must maintain communication between all parties but yours must be sensible what information is necessary from them that does not bring the entire company's quality process into question. Even if you have some issues there are ways of raising the concerns that do not show the company in a poor light.
>
> I understand if you may be frustrated with the issue, but because of this complaint we stand to lose the cruise line work. Not just because of the end customer but because WNA has more or less confirmed they were using their engineers for upcoming work.
>
> As a direct result of all of this the next overhaul now has <u>not</u> gone to WAU. WNA will now take more control of the work cutting us out of the business.
>
> …
>
> This has drawn a lot of attention and is now with the QE8S managers, which will now waste more of our time trying to explain what has happened, how to prevent, etc etc, it is a large admit [sic] burden and a very frustrating processes because there is no excuses for this behaviour leaving no reasonable explanations to give.
>
> Please let me know your thoughts?

[47] Mr Hurst responded to that email requesting some time to gather his thoughts before responding fully.

[48] On 24 March 2014, WAU sent a second email in relation to potential disciplinary action. That email sent by Mr Santos stated:

> In amplifying Peter's email, we have been advised by WNA that the customer is not happy with your performance. The customer has also advised us not to send you back for obvious reasons now. The situation was compounded by the emails you have been circulating around giving WAU and Wartsila as a whole a bad name. I have no problem if you were raising valid internal issues as long as this will be kept discretely and internally. There are some reworks to be done, the communications could have been handled better. However, I was shocked to see that you have involved the customer in the loop that should have been for our consumption only. Providing customers

> bullets to shoot us is NOT acceptable. This has heavily impacted our business and WAU's reputation. WAU just lost the next engine supervision work to WNA due to this and also put a big question mark on the reputation of our workshop because of your comments. This is sabotage to our business and to our reputation.
>
> As a senior service engineer and the face of the company on the ground it is your responsibility to represent the company in a professional manner. The tone and contents of your emails copied to the customer proved that you have not exercised any discretion. This is in clear breach of our code of conduct. Your sarcasm in dealing with the FS coordination team is not acceptable. Please note that from memory, this is not the first time that you have been in a situation where your unacceptable conduct has been called out. A written warning has already issued to you some time back regarding a similar incident. Unfortunately these strings of incidents are now leaving us no options now. Please note that WAU management will not tolerate such behaviour.
>
> In view of the above, please explain within 24 hours why no severe disciplinary action will be taken against you.

[49] Mr Hurst responded on 24 March 2014 by email stating:

> Unfortunately in the below email strong accusations have been made, for which I will need factual evidence in order to present a case for my defence.
>
> Clearly if this situation leads to me being terminated from my employment with WAU then I will need this information.
>
> Please send to me all evidence to substantiate the charges being laid including contact details etc.
>
> At the point of departing the ship 1600 20/3/2014 I was asked by senior first engineer Alan, to assist with sourcing drill bits in Wellington.
>
> This I completed by going out to a local supplier and returning to the ship in time before departure.
>
> These were vital to meet the overdue fitting of smoke alarms to be fitted throughout the ship.
>
> I have received messages thanking me for helping out Princess Cruises not only with this exercise but also for assembling a turbo DG#4 without any training.
>
> Therefore I find the comment "that the customer is not happy with your performance" extremely confusing and upsetting.
>
> Therefore could you clarify the situation with the term customer. Is it Princess Cruises or WNA?

[50] Later Mr Santos replied identifying that the customer was both WNA and Princess Cruises. He also advised Mr Hurst that whatever he says or puts in print that is detrimental to the reputation of the company is destroying the company's image and impacts on future business dealings. He reiterated to Mr Hurst that this is unacceptable.

[51] Mr Hurst responded later by way of email on 24 March 2014 stating:

> Quite clearly it is obvious in anyone's eyes that no matter what I say will make no difference to the situation. I too also believe in Wartsila ethics and strongly object to the image that is being portrayed about my stance with the company I'm proud to be an employee of [sic].
>
> …
>
> I've asked you to respond to the strong accusations that you have made, to which you have now added the words quote "destroying the company's image" into the equation.
>
> You have so far not responded to the basic questions I have asked you to follow up on.
>
> Therefore the situation is becoming untenable and will remain so until you are prepared to calm down and approach this in a professional manner.
>
> For your information my mobile and home lines are private and thus not available for further discussion regards this matter while this atmosphere continues.

[52] On 25 March 2014, Mr Peter Rothwell of WAU then sent a third email in relation to the disciplinary process to Mr Hurst. That email set out the excerpts from the emails WAU was complaining of and was followed with a comment from Mr Rothwell which identified WAU's concern with that excerpt. In all there were nine excerpts from various emails sent to WAU personnel, WNA personnel and Princess Cruises personnel. In each bullet point, the text was quoted and the concern for WAU was identified.

[53] In a response on 25 March 2014 Mr Hurst noted in an email:

> Thanks for submitting to me the below correspondence.
>
> Clearly as it stands and the way it has been presented it has obviously been formatted to put me in as bad a light as possible.
>
> I will attempt to correct any mistakes and misrepresentations as I see fit.

[54] On 26 March 2014, Mr Hurst sent a comprehensive response to Mr Rothwell's email.

[55] After receiving Mr Hurst's response, Mr Rothwell, Mr Santos and Mr Segula discussed the response and decided that dismissal was the appropriate sanction unless Mr Hurst took responsibility for his actions and showed some remorse.

[56] On 8 April 2014, Mr Segula, Mr Rothwell and Mr Santos called Mr Hurst to discuss the issues raised in the disciplinary emails.

[57] Mr Hurst was told that WAU had no option but to terminate his employment effective immediately. This was because his behaviour had resulted in a serious customer complaint and the loss of two jobs withdrawn by WNA. Mr Hurst was advised that this behaviour was against the code of conduct. He was then asked if he had any comments to which he replied he had none. Mr Segula confirmed that Mr Hurst would receive confirmation of termination in writing later that day.

[58] Mr Segula then sent a letter dated 8 April 2014 to Mr Hurst. That letter stated:

> Your recent behaviour on the vessel Sea Princess has undermined Wartsila's reputation with the direct customer. Your unethical conduct between the direct and network customers has discredited Wartsila Australia.
>
> Complaints from the customer have been forwarded through our North American network customer. This has resulted in the immediate cancellation of up and coming scheduled work including possible future work to Wartsila Australia.
>
> Your behaviour on the job goes against the global Wartsila Group and Wartsila Australia Pty Limited code of conduct. The company strives to maintain the highest ethical standards in all its business practices. Each employee is expected to be loyal, act responsibly and with integrity and comply with the code of conduct.
>
> Wartsila Australia Pty Limited has no option but to terminate your employment effective immediately due to non-compliance with our code of conduct.

Did WAU conduct a fair disciplinary process?

Did WAU investigate the alleged misconduct and the relevant circumstances properly?

[59] I am not satisfied that WAU properly investigated the five emails to understand how and why they were sent, the consequences of them being sent

particularly with WNA and Princess Cruises and whether their concerns about the emails were actually borne out.

[60] In this regard my key concerns are:

(a) None of Mr Rothwell, Mr Santos nor Mr Segula investigated the First Email at the time it was sent or even properly when the issues with Mr Hurst escalated around 20 March 2014. This means they largely relied on Mr Patel for information about WNA's concern and its response to the email. And, nobody spoke to Princess Cruises about its concerns and response to the email.

(b) Similarly, none of Mr Rothwell, Mr Santos nor Mr Segula investigated the impact of any of the other four emails, either on WNA or Princess Cruises.

(c) There was no evidence that any of Mr Rothwell, Mr Santos or Mr Segula investigated the underlying service and maintenance issues that caused Mr Hurst to comment as he did in the five emails.

[61] Ultimately, WAU complained that Mr Hurst's actions were unethical, disloyal, irresponsible and lacked integrity. It says these actions were a breach of the Wartsila Code of Conduct that caused WAU to be discredited and undermined and resulted in customer complaints and loss of work. WAU drew these conclusions based on a subjective assessment by Mr Rothwell, Mr Santos and Mr Segula and information passed on to them by another employee, Mr Patel. They did not obtain objective information directly from the very people and entities they say were influenced by these actions.

[62] A large part of WAU's decision appeared to be motivated by the consequence that it lost further work from WNA, but did not properly investigate why it lost the work. WAU quickly and readily assigned that blame to Mr Hurst's emails without looking further.

Did WAU provide the relevant information and explain the allegations and consequences to Mr Hurst?

[63] The three emails sent to Mr Hurst on 21 March 2014, 24 March 2014 and 25 March 2015 failed to properly set out the relevant information, explain the allegations and explain the possible consequences for Mr Hurst.

[64] The first disciplinary email was more of an expression of concern without being a formal step in a disciplinary process. It lacked detail and information about the disciplinary process, including simple aspects such as next steps and the right to obtain advice. So, for example, it is not clear to Mr Hurst that if he responded to the request to let WAU know his thoughts what WAU would do with that information.

[65] The second disciplinary email did nothing to clarify these matters other than indicate clearly that WAU was not happy, this matter was being treated as a breach of the code of conduct and severe disciplinary action was likely. The email appears to be angry and predetermined in many of the statements, making assertions rather than raising issues to be answered by Mr Hurst.

[66] The third disciplinary email was much clearer, outlining the allegations by reference to the specific emails and summarising the WAU view. It provided a clear and concise account of WAU's concerns.

[67] This third disciplinary email remedied many of the failings in the process up to this point. However, the end result of the approach by WAU to Mr Hurst in the disciplinary process was not completely fair, it had elements of anger and predetermination in it and it lacked clarity over the steps in the process and what was expected from Mr Hurst. It also failed to make it clear that WAU was considering termination.

[68] The biggest omission by WAU was the failure in the process to put to Mr Hurst the allegation that he failed to take responsibility for his actions, either in responding to WAU in the disciplinary process or in responding to WNA and Princess Cruises in the course of the emails he sent. This was a formative issue and determinative for WAU, yet Mr Hurst was not made aware of it at any stage in the process.

Did WAU give Mr Hurst an appropriate opportunity to respond to the allegation and any information provided?

[69] I am satisfied that Mr Hurst had an adequate opportunity to respond to the concerns that WAU expressed to him that it had over the five emails. This was set out in his response to the comprehensive email from Mr Rothwell on 25 March 2014.

[70] However Mr Hurst was not given an opportunity to respond to the concern that WAU had that he had failed to take responsibility for his own actions.

Did WAU consider Mr Hurst's response properly before it made its decision?

[71] The evidence from Mr Rothwell, Mr Santos and Mr Segula about their consideration of Mr Hurst's response to the allegations was not compelling. Mr Hurst's response was set out in an email of 26 March 2014. That email contained explanations and raised some questions about the information. It also contained an appropriate admission that in one instance Mr Hurst mistakenly copied Princess Cruises into his email.

[72] WAU did not respond to Mr Hurst's questions and this calls into question how much weight and consideration they afforded to his explanation.

[73] It appeared to me, from the evidence, that Mr Rothwell, Mr Santos and Mr Segula reviewed the five emails and decided, after limited investigation, that Mr Hurst's actions were in breach of Wartsila's Code of Conduct. They also determined that these actions had caused at least one complaint and the loss of work. This warranted some disciplinary sanction but in order to mitigate against dismissal they wanted to see remorse and ownership from Mr Hurst. They did not really want an explanation so did not pay too much attention to it – they wanted a response that they did not get and, as a result, they felt they had no option but to dismiss Mr Hurst.

Did WAU give Mr Hurst an appropriate opportunity to respond to the decision to dismiss him and if so, did it consider this?

[74] Mr Hurst was not aware that WAU was considering dismissal as an option when Mr Rothwell, Mr Santos and Mr Segula called him on 8 April 2014 and he was not given adequate time to consider that and respond.

If there were any procedural failings, was the disciplinary process unfair?

[75] I am satisfied that the disciplinary process was unfair to Mr Hurst. In addition to the matters I have identified, other aspects added to this. I will not list all of them but by way of example, Mr Hurst requested that WAU not contact him by telephone but rather use work email for communication on the disciplinary process. Despite this WAU did not respond to him by email when it wanted to meet to discuss the outcome of the disciplinary process rather it just called him unexpectedly.

[76] An example of how the flawed process led to unfairness for Mr Hurst arises out of the Second Email. This was the email that Mr Hurst sent to Mr Patel and

copied to Princess Cruises. In his email of explanation of 26 March 2014, Mr Hurst said he mistakenly copied the email to Princess Cruises. There was no evidence from WAU that Princess Cruises complained about this email or even that it had any concerns, primarily because WAU did not investigate this with Princess Cruises.

[77] Mr Patel then sent the email to Mr Weber of WNA and Mr Weber complains about the email and the underlying defective workmanship.

[78] So, the issue of concern for WAU about this email is caused by Mr Patel inappropriately sending the mail on to WNA, not by Mr Hurst's actions. WAU did not make this distinction because it did not investigate properly nor did it assess Mr Hurst's response. It follows that WAU did not take any action against Mr Patel for his conduct in sending the email to WNA.

Is WAU's decision to dismiss substantively justified?

[79] The process was sufficiently flawed that I cannot say whether given a proper investigation and a fair hearing that a fair and reasonable employer could have decided to dismiss. Some examples include:

(a) WAU failed to consider that Mr Hurst was correct about service issues and may have been right to complain as he did, even if he did include WAU customers (as they had a right to know of the faults or did already know). This mitigates against a finding of serious misconduct and mitigates against dismissal.

(b) WAU failed to recognise that Mr Patel caused an issue by sending the Second Email to WNA and Mr Hurst may not have been at fault. The Second Email was significant in terms of the complaint by WNA and the loss of work and, I believe, very influential on WAU. Without this significant element of misconduct it may be that dismissal was not warranted.

(c) WAU failed to consider the explanations for the other aspects of misconduct and it drew conclusions without properly considering whether the events that happened were serious misconduct or not.

(d) WAU failed to consider mitigation including the accident Mr Hurst suffered, the lack of preparation by WAU that he complained about, the poor service from the WAU parts team, and the on-board mechanical failings including the explosion in one of the diesel generators.

[80] WAU's decision to dismiss Mr Hurst was not substantively justified.

Remedies

[81] As Mr Hurst has been successful with his grievance I must consider what remedies, if any, he is entitled to.

Compensation

[82] First, I will consider compensation for humiliation, loss of dignity and injury to feelings pursuant s 123(1)(c)(i) of the Act.

[83] Mr Hurst gave evidence of the impact of the dismissal, as did his wife, Katheryn Hurst and his son, Kevin Hurst. The evidence shows that:

(a) Mr Hurst described the dismissal as the ultimate sanction and in this case one that was not fair in all the circumstances. He accepted he made some poor comments in his emails but that did not justify WAU's actions, he was shocked to be treated as he was.

(b) Mr Hurst suffered from sleepless nights, was upset and unsettled and his confidence was knocked.

(c) Mrs Hurst's evidence clearly described Mr Hurst losing confidence and suffering distress over the impact on his reputation. She also described him as becoming depressed particularly when the reality of what had happened settled in. He became withdrawn and was not his usual self.

(d) Kevin Hurst described his father's behaviour post dismissal, as totally out of character. He stated Mr Hurst deteriorated day by day, things were not done around the house, he would take it out on him flying off

> the handle at the smallest things, put simply he suggested, "he was not my father".

[84] I am satisfied that Mr Hurst suffered a loss of dignity by the way he was treated. I could see that he valued his career, took pride in his work and attained confidence and self-esteem from this. Being dismissed for misconduct in circumstances that he could not reconcile impacted his dignity and was humiliating. Mr Hurst also suffered injury to his feelings manifesting in withdrawal from his family, loss of motivation, loss of confidence, anger, upset and some depression.

[85] Based on this evidence I assess compensation for humiliation, loss of dignity and injury to feelings pursuant s 123(1)(c)(i) of the Act to be $10,000.00.

Lost remuneration

[86] Second, pursuant to s 123(1)(b) of the Act I may provide for reimbursement to Mr Hurst of any wages or other money he lost as a result of his grievance.

[87] The first consideration is has Mr Hurst lost remuneration because of his grievance? WNZ says Mr Hurst has not mitigated his loss and therefore there is no lost remuneration at all – the failure to mitigate breaks the chain of causation as the loss arises from the failure to find another job and not the dismissal.

[88] A full bench of the Employment Court considered mitigation in *Xtreme Dining Ltd v Dewar*[1]. The court stated at [104]:

> In summary, where the employer puts mitigation in issue, the employee must provide relevant information as to the steps he took to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[89] So, the onus rests on WNZ to satisfy me that Mr Hurst acted unreasonably in his attempts to find further work after his dismissal.

[90] Mr Hurst's evidence was that there were limited opportunities for employment in New Zealand. Based on his specific skills, the limited job market and the potential adverse reaction by an employer in New Zealand to his dismissal he decided he should look for work in the United Kingdom, where he was originally from. He did

[1] [2016] NZEmpC 136

this and was able to find some contracting work and then full time employment 16 weeks after his dismissal.

[91] In some respects, Mr Hurst's efforts to mitigate his loss were not dissimilar to Mr Dewar in *Xtreme Dining.* Faced with difficulty in finding suitable employment in Christchurch because of the type of role Mr Dewar wanted, the adverse impact of the dismissal (in that case for dishonesty) on his ability to obtain a new job and his personal circumstances, Mr Dewar decided to undertake study. In that case, the Court found that Mr Dewar had not acted unreasonably.

[92] In this case, faced with difficulty in finding suitable employment in New Zealand because of the type of role Mr Hurst wanted, the adverse impact of the dismissal on his ability to obtain a new job and his personal circumstances, Mr Hurst decided to relocate to the UK and search for work there. That seems entirely reasonable to me and I am not persuaded by WNZ's argument on mitigation.

[93] So it follows that Mr Hurst did lose remuneration because of his grievance and I must now consider quantum. Pursuant to s 128 of the Act if I am satisfied Mr Hurst has lost remuneration because of his grievance I should award the lesser of three months ordinary time remuneration or his actual loss.

[94] I have had the benefit of comprehensive submissions from both parties' counsel on remedies including calculations for lost remuneration. The calculations differed significantly over both ordinary time remuneration and actual loss.

[95] For the ordinary time calculation, the difference arose because WNZ paid Mr Hurst a salary for 38 hours of work per week and then overtime for additional work. The amount of overtime varied significantly from week to week. Counsel for Mr Hurst says ordinary time remuneration should include overtime hours based on the previous 12 months earnings and counsel for WNZ says it should be the salary amount plus two other benefits that were paid consistently.

[96] In this case, I accept counsel for WNZ's submissions on calculation of ordinary time remuneration. For Mr Hurst this was $3,800.16 (gross) per fortnight. Three months ordinary time remuneration is therefore $24,701.40 ($3,800.16 x 6.5).

[97] For Mr Hurst's actual loss, both counsel base their calculations on an average fortnightly remuneration amount for the previous twelve months. The difference in

calculation arises because counsel for Mr Hurst has inadvertently included additional payments as part of his calculations.

[98] Again, I accept counsel for WNZ's calculation and base Mr Hurst's actual loss on WNZ's figures, which gives me a figure of remuneration of $8,643.52 (gross) per fortnight.

[99] Mr Hurst obtained full time employment 16 weeks after his dismissal. During this period of time he was paid some additional payments from WNZ and he earned some money from contracting work he undertook in the United Kingdom. I calculate Mr Hurst's actual loss as follows:

(a) Remuneration Mr Hurst would have earned in the 16 weeks post dismissal - $8,643.52 x 8 = $69,148.16;

(b) Less the amount Mr Hurst was paid by WNZ, using the figures provided by counsel for WNZ - $69,148.16 - $9,500.40 = $59,647.76;

(c) Less the amount Mr Hurst Earned from contracting work, using the invoices from Mr Hurst - $59,647.76 - $6,157.50 = $53,490.26;

[100] Therefore, Mr Hurst's actual loss is $53,490.26. Clearly, this is greater than three months ordinary time remuneration so my starting point is $24,701.40.

[101] Mr Hurst asks me to exercise of my discretion under s 128(3) of the Act to award him his actual loss.

[102] The exercise of the discretion under s 128(3) was considered by the Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang*[2] stating:

> [24] We now deal briefly with the applicable principles. In *Telecom New Zealand Ltd v Nutter*, this Court approved the principle that compensation for lost remuneration is discretionary and that there is no automatic entitlement to an award reflecting the balance of the expected working career of an employee. The Court said:
>
> > … it is now well-established in New Zealand that a "full" assessment of the financial loss suffered by an employee as a result of an unjustifiable dismissal merely sets the upper limit on an award of compensation (in that no award can be for more than has been lost) and there is no automatic entitlement to "full" compensation.

[2] [2011] NZCA 608

> [25] The Court said that moderation is appropriate in setting awards for lost remuneration because:
>
> …
>
> - 1. The discretionary nature of the remedy is obviously inconsistent with any principle requiring "full" compensation to be awarded.
> - 2. The concept of unjustifiable dismissal is flexible and a full compensation approach may be disproportionate to the nature of the wrong.
> - 3. Full compensation may be unnecessarily and inappropriately damaging to the employer (and indirectly to the position of other employees of the same employer).
> - 4. Rules of thumb as to appropriate measures of compensation can facilitate both the efficient dispatch of litigation and reasonably predictable outcomes …
> - 5. A community expectation of "full" compensation extending to compensation for years of foregone remuneration could discourage employment and personal rehabilitation.
>
> [26] The Court said that the employee's actual loss "sets an upper ceiling on any award and it is plainly a logical starting point for assessment". The assessment of compensation in any particular instance "must be individualised to the circumstances of the case", and the assessment "must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment" (that is, counter-factual analysis). …
>
> **…**
>
> [36] It is axiomatic that the full financial losses suffered by the respondent as a result of the unjustifiable dismissal merely set the upper limit on an award of compensation. But there is no automatic entitlement to full compensation. As the decision of this Court in *Nutter* makes clear, moderation is required in setting awards for lost remuneration. Any award of compensation in a particular case must have regard to the individual circumstances of the particular case. Having said that, as with any awards of compensation which involve a discretionary element, precision is difficult and the award will inevitably involve a broad brush approach.

[103] The Court of Appeal has made it clear that there is no automatic entitlement to full loss. This loss merely represents the upper award. I must decide whether I should exercise my discretion to award more than the three-month ordinary time minimum and if so how much more, up to the actual loss. And, in doing so I should recognise that moderation is appropriate, my assessment should be individualised to the circumstances of the case and I must allow for any contingencies that might have resulted in termination of the employee's employment such that he or she would not have earned the total amount of the claimed loss.

[104] In this case I am satisfied that it is appropriate to apply my discretion to award Mr Hurst more than three months ordinary time remuneration. Mr Hurst consistently worked overtime and had a reasonable expectation of this continuing. Any assessment of lost remuneration should factor this in and ordinary time remuneration does not achieve this. There is also nothing in the evidence that indicates to me that Mr Hurst would likely have been dismissed or resigned within the 16 week period for which he claims his full loss. Finally, I am satisfied that Mr Hurst's full loss is a moderate amount in the context of this case.

[105] I assess the lost remuneration that Mr Hurst is entitled to pursuant to ss 123(1)(b) and 128 of the Act to be $53,490.26.

Special damages

[106] Having relocated to the UK in order to obtain new employment Mr Hurst incurred considerable flight costs to attend mediation and then the investigation of this matter. He seeks to have these amounts paid as special damages. I am not satisfied that this is appropriate and will not award those costs as special damages. This does not preclude those costs being considered in any award of costs if I am required to make a determination on costs later.

Contribution

[107] Pursuant to s 124 of the Act I must consider whether Mr Hurst contributed to his grievances in such a way that I should reduce the remedies that I have awarded.

[108] In *Xtreme Dining* the Employment Court summarised the approach to contributory behaviour as follows:

> [179] An analytical approach which has often been found useful was described in *Paykel Ltd v Ahlfeld.* Although that decision related to the correct approach to be adopted under s 40(2) of the Employment Contracts Act 1991, its terms are, for present purposes, closely similar. The three steps endorsed by the Court in that case are:
>
> > a) First, there must be a determination as to whether the employee has a personal grievance.
> >
> > b) Secondly, the (now) Authority or Court must consider the extent, if any, to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. It is the "actions" of the employee which are to be considered if they contributed not to the actual personal grievance itself, but to the situation which gave rise to the

> claim that the employee has a personal grievance. In carrying out this step, there should be a consideration of causation in determining the extent to which the employee's actions contributed to the situation giving rise to the personal grievance.
>
> c) The third step is to be carried out if there is a causal connection between the actions and the situation that gave rise to the dismissal. If "those actions so require" the decision-maker must reduce the remedies that would otherwise have been awarded. The use of the word "must" demonstrates that the step is mandatory. The actions that require a reduction in remedies are actions which may loosely be categorised as being "culpable" or "blameworthy".

[109] When assessing if Mr Hurst's actions contributed to the situation that gave rise to his grievance I am looking for a causal link between Mr Hurst's actions and the situation that gave rise to his dismissal. If I am satisfied that Mr Hurst's behaviour contributed to his grievance i.e. there is a link, then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.

[110] I accept that Mr Hurst did contribute to his grievances. There is a causal link between the five emails that he sent and his grievance. I am satisfied that the behaviour in sending the emails was blameworthy. I conclude that Mr Hurst's remedies should be reduced by 30%.

Counterclaim

[111] WAU's counterclaim against Mr Hurst alleges that he breached the duty of fidelity, the duty of good faith and the code of conduct in sending the five emails. The loss WAU suffered, as a result of these breaches is the loss of further servicing work from WNA.

[112] As Mr Hurst was employed by WNZ and not WAU, I do not have jurisdiction to hear this counterclaim. In addition, as the loss complained of is a loss for WAU, I cannot treat WAU's counterclaim as a counterclaim on behalf of WNZ (as I did with the statement in reply).

Determination

[113] Mr Hurst was employed by Wartsila New Zealand Limited.

[114] Wartsila New Zealand Limited unjustifiably dismissed Mr Hurst.

[115] Wartsila New Zealand Limited is to pay Mr Hurst the following sums (which includes the deduction for 30% contribution) by way of remedies:

(a) $7,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

(b) $37,443.18 pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000

[116] I do not have jurisdiction to determine the counterclaim lodged by Wartsila Australia Pty Limited.

Costs

[117] Costs are reserved. The parties should seek to agree how they will deal with the legal costs incurred in taking part in these proceedings. If they cannot agree, any party seeking a contribution to its legal costs may lodge and serve a memorandum within 28 days of the date of this determination. Any party opposing that application may then lodge and serve a memorandum in reply within a further 14 days.

Peter van Keulen
Member of the Employment Relations Authority