

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 31  
5349883

BETWEEN DWANE WOOD  
Applicant  
A N D UNITED FISHERIES  
LIMITED  
Respondent

Member of Authority: M B Loftus  
Representatives: Mary-Jane Thomas, Counsel for the Applicant  
Penny Shaw, Counsel for the Respondent  
Investigation Meeting: 14 February 2012 at Invercargill  
Submissions Received: At the investigation  
Date of Determination: 22 February 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mr Dwane Wood, claims that he was unjustifiably dismissed by the respondent, United Fisheries Limited (United), on 3 August 2010.

[2] He also claims to have not been paid for work performed on that and the previous day (2 August).

[3] United's reply is that Mr Wood was not one of its employees and therefore it could not have dismissed him. United says that Mr Wood was, as is common practice in the industry, a self-employed contractor.

**Background**

[4] Mr Wood was engaged as a deckhand on the *FV Ariel* under what he accepts was a contract for services in January 2010, though a written agreement was not

signed till 8 March. As already said such arrangements are common in this industry and the approach has been condoned by both the Inland Revenue Department and the Employment Court (see *Muollo v. Rotaru* [1995] 2 ERNZ 414).

[5] Aside from various provisions which confirm the nature of the relationship such as *...no term of this Contract shall be construed as creating any employment relationship between the Owner and the Contractor* the contract also contains clauses relating to duties, remuneration and termination which are relevant to this dispute.

[6] The duties clause (1.4) provides that:

*THE services of the Contractor consist of, in co-operation with the other Contractors on the Vessel, the:*

- Preparation towards and the catching, sorting and preparing of the catch at sea as required by the Owner, and*
- Keeping of such catch and in a fresh, presentable, usable and acceptable condition, and*
- Unloading of such catch for delivery to a LFR, and*
- Any other related activities as required by the Owner.*

[7] The payment arrangements are contained in an appendix which stipulates two rates of remuneration. Both are based on a percentage of the catch's value, with the first applying to oyster catches and the second to other fishing.

[8] The termination provision (clause 3.1) provides that:

*THIS Contract shall apply to the first Voyage of the Vessel after the date of this Contract, and shall thereafter apply to any subsequent voyages of that Vessel, unless this Contract is terminated in accordance with Clause 3.2 or 3.3.*

And (clause 3.2):

*EITHER party has the right, for whatever reason and without having to give reasons, to terminate this Contract at the conclusion of a voyage or any time thereafter, either verbally or in writing, with instant effect or from such other time as agreed between the parties.*

[9] Essentially *Ariel's* catch alternates between oysters, which may be caught during a regulated season, and other types caught by trawling. Switching between these types of catch requires a change of equipment but the parties have differing views about how long the conversion process takes. Mr Wood says a fortnight but I prefer United's view that it is about a week (quicker if an effort is made) and here I note the vessel is about to undergo the process again and a week has been set aside.

The parties do, however, agree that not all crew members are necessarily required to assist.

[10] It is this that leads to another practice not mentioned in the written agreement. That relates to an additional payment for work that is preformed while the vessel is docked and not acquiring a catch to which the normal remuneration approach (percentage of the catch) applies. According to the *Ariel's* skipper, Mr Anthony Fowler, this is an arrangement he sought when United took over the company that previously owned the vessel. Essentially he considered it unfair that there were some non sea going duties that did not directly involve attaining a catch in whose value the crew could share and were not necessarily performed by all. He asked that United agree to his paying those who assisted an hourly rate for such work and United agreed.

[11] United's evidence would suggest that the process is somewhat ad-hoc. Payments are made when Mr Fowler so recommends and the rate can vary, though it appears that \$16 per hour is that most commonly applied. It is also clear that this approach is not applied by all companies operating vessels out of Bluff, with a number claiming that percentage of the catch covers all necessary tasks.

[12] 2010 was not the first year during which Mr Wood had been engaged by United, and the evidence confirms similar arrangements governed by identical written agreements in both 2005 and 2007. The exact dates are unclear as the dates the contracts were signed and/or stated to apply from are inconsistent with payment records produced by United. That said, it is common ground that Mr Wood undertook both oyster and conventional trawl voyages during both previous engagements. It is also common ground that he received hourly rate payments during both previous engagements.

[13] Here, and as an aside, I should also mention that United's payment records are also inconsistent with a couple of pay slips that Mr Wood produced but, thankfully, that does not affect the determination of this claim.

[14] Notwithstanding the written provision that the arrangement continue from voyage to voyage until expressly terminated, Mr Wood claims that his contract only applied to the 2010 oyster season. He says it would terminate at the end of the season and that he then anticipated getting a new contract when the vessel went trawling. He

claims that did not occur but that toward the end of the oyster season Mr Fowler approached him and asked that he assist with preparing the boat for trawling. He says he agreed and that the work would commence on Monday, 2 August before asserting that he understood he would perform this work as an employee as:

*... such work was incapable of being remunerated for on the basis of a 'share of the catch' which was what happened whilst [he] was engaged in 'contract for service' work at sea ...*

[15] United's view differs. It claims that work to prepare a vessel for, and clean up after, a voyage is part and parcel of this arrangement. As Mr Fowler puts it:

*... work on the vessel to prepare for and clean up the beginning and end of each season ... is always done as part of the contract, it's not part of a separate arrangement, it's part of the season. I have never done this work as an employee and never had anyone else do it as an employee either.*

[16] Indeed it is Mr Fowler's view that even if he were not to receive the hourly rate normally applied to such work, Mr Wood would be well remunerated for this new voyage given, as :

*When the 2010 oyster season started there were only four crew when we would usually have five because a mate I had lined up to work didn't turn up. If we work with less crew we get more money as there are less crew to share it amongst. The crew all agreed to go four handed so they could earn more money. Right at the end of the season another crew member didn't turn up so it was just me, my son Dylan (who is called often Billy) and Dwayne. I asked them if they wanted to go out three handed and they were pretty keen. It is quite a bit more work for me but I said to them we could go three handed on the condition they help me with getting all the oyster gear off the boat at the end of the season.*

[17] Returning to the events of 2 and 3 August 2010. One of the main tasks was the removal of an oyster table which had been welded to the deck. Mr Wood says:

8. *On Tuesday 3<sup>rd</sup> of August we had ground off the legs and the table was ready to shift. Mr Fowler instructed me to go and get a jimmy bar to lift the table.*

9. *I returned with what turned out to be the wrong bar. This greatly upset the skipper and he went "ape". He yelled and screamed at both me and Bill (referring to Mr Fowler's son Dylan).*

10. *He then "fired" his son, on the spot. Bill asked me if I could take him home as he lived in Bluff. I said yes.*

11. *While we were still on the vessel, the skipper was on the wharf, and he started yelling at me. He asked me if I was going to*

*leave as well. I said no. I said I was going to take Bill home. The skipper then fired me.*

...

13. *This is not something unusual. I often got the sack by the skipper. What usually happened was that the skipper would ring me a couple of days later and tell me to get back to work and everything goes along fine.*

14. *This time he did not ring.*

[18] Mr Fowler agrees that there was an altercation and that he was annoyed and frustrated. He does not, however, accept that he dismissed Mr Wood but infers Mr Wood left of his own accord. He says that after leaving to take Dylan home:

*Dwane returned about an hour later. By this time the bench had been lifted off the boat, everything else had been done and the boat was turned around. When he came back I asked Dwane what he was doing and he said he came back to get his gear.*

[19] At the commencement of the investigation Ms Thomas advised that Mr Wood's evidence (17 above), along with a similar outline of events contained in the initial statement of problem, was incorrect in that advice of termination was given after Mr Wood returned from taking Bill home and not before he left.

[20] As stated in Mr Wood's evidence Mr Fowler did not ring and invite him back. Instead correspondence began to flow between legal representatives and that has led to this investigation meeting.

### **Issues for determination**

[21] There are, possibly, four issues for determination. They are:

- (a) What was the nature of the relationship that existed between the parties on 3 August 2010;
- (b) If it is determined that the relationship was that of employer and employee; was Mr Wood dismissed or did he simply 'walk out' as suggested by Mr Fowler?; and
- (c) If he was dismissed, was the dismissal unjustified?; and
- (d) If an employee, are there arrears owing?

**Determination**

[22] The first question is whether or not Mr Wood was an employee or a contractor. This must be determined first as the right to take a personal grievance is bestowed upon an employee and is not available to a contractor engaged under a contract for services (see s.5 of the Act).

[23] Mr Wood accepts that he was initially engaged under a contract for services but claims that arrangement came to an end at the end of the oyster season which would occur on either 31 July 2010 or upon acquisition of the allocated quota, whichever came first. As events transpired the relevant date was 31 July and Mr Wood claims that he was then re-engaged as an employee to perform work associated with preparing *Ariel* for trawl fishing from 2 August onwards. It is this assertion that underpins his present claim, with both he and his counsel accepting that if he is wrong in this respect his claim must fail.

[24] It is my view that Mr Wood is unable to establish that the nature of the relationship changed and that his claim will therefore fail. I reach this conclusion for the following reasons.

[25] Contained in Mr Wood's evidence in chief is a bald assertion that *the contract was specifically for the oyster season and ended when the oyster season finished*, yet there is absolutely no evidence about how that arrangement came into being or the conversation (if any) that led to its formation and it is totally undermined by the express terms of the contract. There is no mention of cessation at the end of the oyster season and Mr Wood proved completely unable to answer numerous questions about how or why he claimed otherwise. Indeed, when pushed, he resiled from his view that the arrangement was always going to terminate at the end of the season and stated *You've cancelled it (the contract) by paying me \$16 per hour*. This was a reference to Mr Fowler's promise that Mr Wood would be paid at that rate while converting the *Ariel* in August 2010. The evidence is that this was not discussed until late July at the earliest and the contention that it was that that brought the agreement to an end is inconsistent with an assertion that it was always going to end at that time.

[26] There is also Mr Wood's acceptance that the one agreement had applied in the past to both oyster and trawl fishing. When asked, he was incapable of giving any rationale for his belief that this previously applicable approach had altered for 2010.

[27] The alternate suggestion that the change to \$16 per hour could only mean that the nature of the relationship changed is, in my view, undermined by Mr Wood's acceptance that he had received such hourly payment before but that they had not, in the past, meant that the nature of the relationship had changed. Again he was unable to explain why the situation had now changed.

[28] He also advised that he did not discuss the nature of the relationship and/or any possible change with Mr Fowler before agreeing to commence the preparation work.

[29] It was also suggested that the inter-season preparation could not be covered by the duties envisaged by clause 1.4. I disagree totally. Aside from the catch-all, *any other related activities*, there is the first bullet point - *Preparation towards and the catching, sorting and preparing of the catch at sea as required by the Owner*. Surely the work being performed on 2 and 3 August was *preparation toward*, especially as that concept is separated by the word *and* from the sea-going duties that are then described.

[30] There was also an argument that interpreting the clause as I have done in 29 above would preclude termination once someone started preparing the vessel but prior to going to sea as they would still be entitled to a share of the catch. It may well be that they are, but I do not have to determine the matter.

[31] Mr Wood also made a number of comments about the fact that United had deducted tax, along with monies to be forwarded to ACC, from his earnings. He appeared to be suggesting that by doing so United was treating him as an employee, especially as the written agreement stated that he was responsible for such payment. Again I discount this as:

- (i) The deductions were authorised by Mr Wood in writing;
- (ii) It was withholding tax that was deducted and not PAYE;
- (iii) This had also happened in 2007 but Mr Wood does not contend that it changed the nature of the relationship then; and
- (iv) The evidence shows that Mr Wood's real issue with this was that United got the benefit of interest that accrued on the amounts

(particularly the ACC contributions) that might otherwise have accrued to him.

[32] There is also reference to the fact that the tax deductions are labelled PAYE on the payment slip and that it identifies Mr Wood as 'employee'. I accept United's reply that the labels are a misleading irrelevance as United engages both employees and contractors, yet uses the one form for all payments to individuals. In addition to that I note that despite applying label PAYE to the tax deductions, the form then makes it clear that the amounts are being deducted as withholding tax and, in any event, the forms provided as evidence cover payments made when Mr Wood accepts he was a contractor.

[33] Lastly I note one question, and its answer, that brings finality to the issue. Mr Wood was specifically asked *Have you ever had a relationship with [United] as an employee?* The answer was *no*.

[34] The conclusion that Mr Wood was never employed by United but remained a contractor means the other three questions need not be determined (or at least in respect to issue four, not in this forum) and that, as Mr Wood acknowledged, his claim must fail.

### **Costs**

[35] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that United, as the successful party, wishes to seek costs it is required to file its application within 28 days of this determination. A copy shall be served on Mr Wood who is to file any response within 14 days.

M B Loftus  
Member of the Employment Relations Authority