

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102711/16 Hearing at Glasgow on 22 and 23 September, and 19 and
20 December 2016

Employment Judge: M A Macleod (sitting alone)

Abid Bashir Hussain

Claimant
Represented by
Mr M Sheridan
Solicitor

North Star (Guernsey) Ltd

Respondent
Represented by
Ms K Williams
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the Judgment of the Employment Tribunal that the claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal on 17 June 2016 in which he complained that he had been unfairly dismissed by the respondent.
2. The respondent submitted an ET3 in which they denied that the claimant was unfairly dismissed, and resisted his claim before the Tribunal.
3. A hearing was fixed to take place on the merits of the case on 22 and 23 September 2016, and in the event, two further days, 19 and 20

December 2016, were required in order to complete the hearing, including evidence on remedy and submissions.

4. The claimant was represented by his solicitor, Mr Sheridan, and the respondent by their solicitor, Ms Williams.
- 5 5. The parties produced and relied upon a joint bundle of documents in the course of the hearing.
6. The respondent called as witnesses Martin James Duthie, Crewing Manager, and Paul Craig, Safety Manager.
7. The claimant gave evidence on his own account, and also called as
10 witnesses Alexander James Laird, Deckhand, and Captain Syed Ahmed, Senior Lecturer at the City of Glasgow College, Faculty of Nautical Studies.

The Pleadings

8. At the outset of the hearing, the claimant sought to amend his claim in
15 order to introduce further and better particulars (27ff). No objection was taken to the introduction of the majority of the averments within the further particulars, but Ms Williams confirmed that the respondent objected to the allegations within paragraphs 6 and 12 of which they considered that they had no prior notice.
9. Ms Williams pointed out that paragraph 6 included an allegation that the
20 Master of the vessel commenced a meeting with the “announcement that the claimant was dismissed from the vessel and the claimant reasonably concluded that there was to be no proper hearing in to the incident”. The respondent had chosen, in their preparations for the
25 hearing, not to call the Master as a witness, and if this allegation were to be permitted to proceed that would prejudice the respondent materially.
10. She also objected to the assertion, in paragraph 12, that Mr Duthie had undertaken a biased investigation owing to his friendship with a colleague, Brian Ritchie, against whom the claimant had made an

allegation of racial discrimination. Again, she argued that the respondent should not have to answer an allegation raised at such a late stage in the proceedings.

- 5
11. Mr Sheridan conceded that if the application to amend were taken in isolation it could be seen as being very late, but it was the culmination of the exchange of very many letters and documents. Looking at those letters and documents brought to mind facts which were not in the claimant's mind when he lodged the ET1.
- 10
12. It is "only to be expected" that the factual matrix in a case such as this would expand, he said, and for that reason there is really no limitation upon the time at which such allegations can be made.
- 15
13. Paragraph 6 is the claimant's version of what happened at the disciplinary meeting on board the vessel on 8 December, and it was not referred to in the ET1. However, if one looks at p132 of the bundle, a statement from the 2nd Officer made it clear that the meeting commenced with a finding.
- 20
14. So far as paragraph 12 was concerned, Mr Sheridan agreed that very little notice had been given of the reference to Brian Ritchie, but he could see no prejudice if Mr Duthie were present as a witness and able to comment on the matter. He said that some notice had been given to the respondent in the form of an email sent to Ms Williams on 13 September with a document which made that allegation.
- 25
15. Following a brief adjournment, the Tribunal was informed that the parties had reached an agreement that the application to amend should be granted, subject to the deletion of paragraph 6. The Tribunal agreed to this, and accordingly, the application to amend was granted in full, subject to that deletion.

Findings in Fact

- 30
16. Based on the evidence presented and the information available, the Tribunal was able to find the following facts admitted or proved.

17. The claimant, whose date of birth is 18 November 1970, commenced employment with the respondent as First Mate (also known as Chief Mate or Master's Mate) on 15 February 2012, and was continuously employed by them in that position until 22 February 2016, when his employment was terminated by way of dismissal on the grounds of gross misconduct.
18. The respondent is a company which employs marine crew for offshore support vessels operating in the North Sea. It operates the Grampian Contender, a vessel carrying out such a function, upon which the claimant was employed as First Mate. The Grampian Contender (hereinafter referred to as "the vessel") is an emergency response and rescue vessel whose role is to respond to any emergency situation which may arise at sea, in the areas in which it is deployed.
19. The vessel is subject to an Integrated Management System operated by the respondent, a set of working procedures for the safe operation of all matters on board, compliant with a legal requirement under maritime law.
20. In addition, the Tribunal was referred to a number of publications.
21. Advanced Navigation, published by Witherbys Publishing, (203ff) is a maritime textbook which sets out maritime rules in relation to preventing collisions at sea: *"As the Master's representative, the OOW [Officer of the Watch] is in charge of the bridge and the bridge team for that watch until properly relieved by the Master or another watchkeeping officer. The OOW should ensure that bridge watch manning levels are at all times safe for the prevailing circumstances and conditions, in compliance with shipboard operational procedures and the Master's standing orders. Procedures for handing over the watch and calling for support on the bridge should be in place and understood by the OOW."*
22. The duties of the OOW are set out (205) as follows:

“In order to maintain a safe navigational watch, the OOW will perform watchkeeping, navigation and GMDSS radio watchkeeping duties, including:

- *Maintaining a lookout*
- 5 • *General surveillance of the ship*
- *Monitoring the progress of the ship and fixing position*
- *Collision avoidance in compliance with the International Regulations for Preventing Collisions at Sea*
- *Recording bridge activities*
- 10 • *Making periodic checks on the navigational equipment in use.*

The navigational duties of the OOW are based upon the needs to execute the passage plan safely and to monitor the progress of the ship against that plan...”

23. At paragraph 5.2.2.5, there is a section entitled “Calling the Master”,
15 which provides that *“In accordance with standing orders or special instructions, the OOW should notify the Master if unsure of the appropriate action for the safety of the ship...”* (206). It also states:
“The OOW will continue to be responsible for the watch, despite the presence of the Master on the bridge, until informed specifically that the
20 *Master has assumed that responsibility and that this is mutually understood. That the Master has taken control on the bridge should be recorded in the logbook.”*

24. The Maritime and Coastguard Agency issued a Marine Guidance Note,
MGN 315 (M) (209), to give guidance on the application of the
25 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978, as amended (SCTW 95) regarding the keeping of a safe navigational watch.

25. The Note states, as 2.1, that *“The OOW is the Master’s representative and is primarily responsible at all times for the safe navigation of the vessel and for complying with the International Regulations for Preventing Collisions at Sea...”*
- 5 26. At 4.0, the Note makes provision for performing the navigational watch, and under 4.1, states that the officer of the navigational watch shall, among other duties, *“...continue to be responsible for the safe navigation of the vessel despite the presence of the Master on the bridge until informed specifically that the Master has assumed the con*
10 *and this is mutually understood.”*
27. The claimant, as First Mate, was the second most senior officer on board the vessel, answering directly to the Master (sometimes referred to as the “Skipper”), Captain Slawomir Sobierajski.
- 15 28. On 7 December 2015, Martin Duthie, the respondent’s Crewing Manager (based onshore in Aberdeen) received a telephone call from the Master between 5 and 6 pm, following an email which he had sent to Mr Duthie at 1705 hours on that date (60). Mr Duthie had not read the email by the time the Master called him. He noted that the Master was upset, although he was calm in tone, and that the Master considered that the
20 claimant had undermined his authority.
29. Mr Duthie advised him that as Master it was his responsibility to deal with the matter under the Disciplinary Code of Conduct (45ff). There was no further discussion about the matter that evening.
30. The email of 7 December was headed “verbal warning”, and stated:
25 *“Hi Martin,*

Just now I had situations, I gave the command to 2 mate to change course for increase speed on his watch to 200 deg and keeping same course until I’ll change, it had pass on to C/O.

When I entered the bridge at 1620 hours, course was changed by C/O, did not perform my command more than that refused my command, he said that he is on watch and will be doing as he thinks.

5 *At the same time he started yelling at me, I called for 2nd officer to confirmed that if passed my command, he said that yes.*

He is a witness very wrong behaviour of chief officer Mr Abid Bashir Hussain.

10 *In the presence of 2nd officer Mr Johannes Ehrhardt I have given verbal warning to C/O, his reaction has become even worse he started screaming and threatening my colleagues from MCA.*

I typed in the logbook the whole situation, and want to enter to OLB, as well as refused to sign any documents. I think that it is racially motivated, Mr Abid Bashir Hussain holds British citizenship and feels like was co-owner of the ship.

15 *I am a Polish so he can consider me a human category below, he do not respect my higher position on the ship. I'm going to take over command of his watch.*

I ask you to reply as soon as possible what to do?

Regards

20 *Slaw*"

31. The official log of the vessel (69) for that day records a number of entries, including the following:

25 *"At this place and time stated I Master S Sobierajski in the presence of 2nd Officer J Ehrhardt given a verbal warning to Chief Officer Abid Bashir Hussain whom were found in breach of North Star Guernsey Code of Conduct 5.1(j) Disobedience of Lawful Order."*

32. The Master signed the entry, and recorded that the claimant refused to sign.

33. The Disciplinary Code listed, under "Gross Misconduct", a number of acts the respondent considered to constitute acts of gross misconduct, which "may lead to dismissal from the ship either immediately or at the end of the voyage and to dismissal from employment without notice or payment in lieu of notice". Disobedience of a lawful order was at paragraph (j) of that list (47).

34. On the following morning, 8 December 2015, the Master convened a disciplinary meeting at 8am in the captain's cabin. A report of that meeting was produced at 72, and reads as follows:

"Meeting held at the captain's cabin at 8am in the presence of Mr Slawomir Sobierajski, Mr Abid Bashir Hussain, Mr Johannes Ehrhardt and Mr Alexander Laird.

The incident from the 7th December 2015 was discussed with all present parties. Statements were taken from each individual person. The master asked for an explanation for the chief mate's actions, chief mate declared he had nothing more to add to the discussion as he said he had sent his information on to the office. Chief mate put the master's authority and qualifications in question, as well as refused to sign all relevant documents and refused to participate any further in the meeting. The meeting was held in a professional manner, and concluded 0820."

35. The note was signed by the Master, Mr Ehrhardt and Mr Laird, but the claimant is noted as having refused to sign.

36. The Master also provided to the claimant a letter (73) dated 8 December 2015, which he, Mr Ehrhardt and Mr Laird all signed, but which the claimant refused to sign. In that letter, he confirmed that "You were found in breach of:

North Star Guernsey Code of Conduct Section 5.1(j) disobedience of a lawful order.

5 *This constitutes gross misconduct. On being questioned by myself with regards to the disobedience it was relayed by yourself that you were on watch and would do what you think. When I asked for your attention you started yelling at me and threatening his colleagues from MCA and contact the office. You did not give me the opportunity to speak, on my requests to calm down, were unsuccessful. I can not communicate with you then I urged the 2nd Officer on the bridge for confirmed that if he passed my command to you, he said that yes and you confirmed.*

10 *On being given a verbal warning by myself in the presence of 2nd Officer Mr Johannes Ehrhardt your reaction has become even worse again did not give me an opportunity to speak, on my requests to calm down, were unsuccessful. I then entered the episode in the deck Logbook and OLB, then you stated would not sign any official documents. This was witnesses by myself and the watchkeeper Mr Alexander Laird.*

15 *This leaves me with no option but to follow my duties as per section 11 of North Star Guernsey Code of Conduct and Disciplinary Procedure and dismiss you from the vessel...”*

37. The claimant submitted a grievance form to the respondent. The time and date upon which he did so were the subject of some confusion.

20 38. At 6.57pm, the claimant attempted to email to Mr Duthie and others a copy of his grievance. The email address from which this was sent (63) bears to have been a_bh1970@yahoo.co, which is plainly incomplete. The document which that email was intended to attach was produced at 64.

25 39. In the grievance, which was not received at the time by the respondent (something which the claimant accepted before the Tribunal), the claimant said:

30 *“I took over watch from 2nd Mate at 4pm on 7th December 2015 the 2nd Mate told me that the captain wanted 200 course to be steered. I asked the 2nd why the captain wanted that as our wind direction was 140 with*

5 *wind speed 40-45 knots. If I continued this course after two – two and a half hours we would have gone on shallow patch or hit Peterhead. The 2nd Mate responded by saying that he didn't know why and agreed that this would happen but it was the order of the captain. As a safety officer and as a watchkeeper during my watch altered the course to 196. I applied 4 degree set and drift avoid the shallow patch following the rules in place to prevent collision or going aground. After a little while the captain come to the bridge and saw that I had altered course, he asked me why I didn't follow orders. I explained my reasons to him, he started shouting and saying he was the master of the ship and he can do what he wanted. I immediately replied saying it was unsafe he kept shouting and screaming at me, he gave a verbal warning saying I did not obey his orders. I altered course back to 200 saying to the captain that I would call him back up before the ship goes aground. As per north star policy anyone can say stop the job if we feel unsafe. At 5.20pm the captain came back to the bridge and altered the course by 30 degrees as he realised his mistake. As a safety officer I feel as a master he gave me unsafe order. He made fake entries in the log book for drills which were not carried out, and as a master should never have been fishing, which he carried out on a regular basis. Every crew member is a witness to the fishing."*

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40. The claimant also made a Safety Observation report on that date (61ff). The report was timed at 1800 hours on 7 December 2015. The report stated, under Description: *"As per my experience and knowledge we were steering wrong course and I made alteration to applied set and rate to avoid collision/aground."* Under Suggestions for Further Action: *"Master should listen to safety advice and take all appropriate action".*

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41. The Analysis Data page (62) has a number of options for completing the form. Under Work Activity, the claimant marked with a cross "Bridge operations, ship handling & navigation"; under Vessel Activity, the claimant marked "Underway offshore/on passage"; and "Bridge" under Location on Vessel.

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42. Under “Root cause analysis”, the claimant marked a cross on the following boxes:

- *Lack of experience*
- *Inadequate supervision or leadership*

5 43. The claimant’s name appeared at the foot of the page, with the date 7 December 2015.

44. The report was sent by email to the respondent on 8 December 2015 at 0520 hours (70) from Grampian.contender@craig.group.com, and copied to the Health and Safety Executive. The email read:

10 “Good morning

Please find our latest safety observation.

Kindest regards,

Abid”

15 45. Mr Goodlad, the respondent’s Marine Manager and Designated Person Ashore (DPA) who received the email, replied at 0723 hours to thank the claimant for his report, and to ask him to re-submit the report with greater detail as to the incident.

20 46. The claimant denied that he had completed the Root Cause Analysis, and that he had not sent the email at 0520 hours, as he intended to consult with the Master about its terms. He maintained that an unknown person had had access to the ship’s computer system, had found the report, added to it and sent it without his knowledge.

25 47. Mr Goodlad emailed Mr Duthie at 1729 that day (75) to advise that he had received a call from the claimant at approximately 8.30 that morning. He said that the claimant “appeared to me to be very agitated and was talking very fast and almost incoherent”. He went on: “*The overriding content of this call in my opinion was to tell me that he did not*

5 *want dismissed from the vessel following the disciplinary action taken against him by the Vessel's Master. He stated to me that he took the correct and appropriate action and refused the direct order from the Master because he knew better than the Master and he was worried about the safety of the vessel. This was covered by the submittal of a Safety Observation which had been submitted at 05:20 hrs on the morning of the 08/12/2015."*

10 48. On 9 December, the claimant sent an email to Mr Duthie, Callum Bruce, Ivan Goodlad, Saleh Al-Ramahi and Paul Craig entitled "Contender – unfair dismissal" (76). In that email, the claimant explained his version of events, repeating that he had taken the action he did in order to avoid collision or the vessel going aground. He advised that he wished to appeal against his dismissal from the vessel as he regarded it as unfair.

15 49. He also attached photographs of the radar and charts to show how the vessel was drifting towards a nearby ship and land. He said that even after reflection he knew he had made a safe decision. He raised the allegation that the captain had been witnessed holding a barbecue on board, and also fishing from the vessel near oil rigs. He concluded:

20 *"Please make a fair decision based on the evidence I have provided, I wish to continue sailing on the Grampian Contender as I did not do anything wrong. Refusing to sail on unsafe course is not a reason to dismiss me from the Ship. Up to Sunday I obeyed everything the Captain wanted exactly the way he wanted it done. I know he is my senior and always gave him the respect and would still continue to do*

25 *so.*

I have tried to put all the events in this and am going on holiday today and will be home on the 22nd of December. I will have email and will hope that you can reach a quick decision."

30 50. On 18 December 2015, Patricia Dos Santos, Director, wrote to the claimant (87) to confirm that he had been placed on suspension pending conclusion of an investigation into the circumstances surrounding his

dismissal from the vessel. He was suspended on full pay. She advised the claimant that his email of 9 December would form part of the investigation.

5 51. The claimant completed a further grievance report on 28 December 2015 (93), being under the impression that his report of 7 December had been received by the respondent. He cited four complaints in that grievance:

- 10 *i.* The Master was guilty of fishing from the vessel, which is prohibited by the respondent;
- ii.* The Master made fake drill entries in the log book, for example in relation to the PLB drill on 8 December 2015;
- 15 *iii.* The Master had given a wrong navigational order which placed the ship and crew at risk. As officer of the watch, the claimant stated that he felt that the Master gave an unsafe order; and
- iv.* The Master had tried to force the claimant to sign a form accepting a verbal warning.

52. He concluded the grievance by asking if these were not enough to suspend the Master.

20 53. Mr Duthie conducted an investigation into the events of 7 December 2015, and also into the allegations made by the claimant against the Master, and produced a report to Ms Dos Santos (111ff).

25 54. Mr Duthie interviewed the Master, the 2nd Officer and Alexander Laird. The interview with the Master was produced in the report (128). He stated that he had left clear instructions with the 2nd Officer that the course was to be 200 due to the vessel's pitching and rolling, and that that course should be followed until further notice. He said that that was to be conveyed to the claimant when he came on watch. He went on: *"The Master stated he attended the bridge approximately 20 minutes*

5 after the watch changed and noticed the vessels course had been altered. He enquired with the Chief Officer in a calm manner if his orders had been relayed by the 2nd Officer and if so why were they not being followed. The Master stated that the Chief Officer responded in a volatile manner. The exact words were not recalled although it was conveyed that the Chief Officer stated clearly he was not going to follow the Masters orders as he was the one on watch and in charge. The Master was shocked and his initial reaction was to leave the bridge and ask the 2nd Officer if his orders had been conveyed, when confirmed he requested that the 2nd Officer also attend the bridge. After they returned to the bridge a further argument ensued before the Master issued a verbal warning to the Chief Officer which was recorded in both the deck and official logbook...

15 The Master drafted a letter to attend a disciplinary hearing at 08.00 hours in the Master's cabin. The invitation letter was issued at 06.00 hours.

20 The Master requested the 2nd Officer and the Chief Officer's watch keeper attend as witnesses. When all were present, the Master read the letter of invitation. According to the Master's statement, the Chief Officer stated that the accusations were all lies. The Master also conveyed that the Chief Officer questioned his competency and a further heated exchange ensued. This resulted in the Chief Officer departing the hearing and refusing to sign any of the records. The Master also stated he had never seen a Chief Officer act in such a manner.

25 The Master was asked if he had been fishing from the Vessel, to which he answered no. The Master was asked if he had been falsifying records of drills and exercises to which he answered no."

55. Mr Ehrhardt's statement was produced in the report (130). It was recorded:

30 "It was conveyed that when the handover took place, between the Chief Officer and the 2nd Officer, the Chief Officer had asked why the vessel

5 *was not steering the original course. The 2nd Officer explained that the Master had conveyed instructions to steer 200 to reduce the effect of the vessel's rolling and pitching. This in turn allowed the vessel to increase speed. The Chief Officer stated it will take us too close to the land. The*
10 *2nd Officer confirmed that as they were still approximately two hours from the land he knew the Master would return to the bridge and reassess periodically. The Chief Officer accepted the watch and signed the deck logbook with position and status acknowledged (which is normal practice and confirms the on signing officer is satisfied with the handover process and has accepted the watch)..."*

56. As to the terms of the exchange between the claimant and the Master, the 2nd Officer was noted as saying:

15 *"...On attending the bridge for the second time a further heated argument ensued. The 2nd Officer stated that the Master asked again in the presence of both Officers 'were my orders conveyed?' The 2nd Officer once again confirmed they had been conveyed. The Chief Officer stated 'I am not disputing that they were passed but the course will take us too close to the land". A further heated argument ensued. The 2nd Officer stated that the Master requested calm on several*
20 *occasions during this period although the Chief Officer was shouting and the exact terms used were not recalled the adjective 'aggressive' was used. It was also stated that the Chief Officer seemed to have 'lost all reason' and the Master repeatedly requested him to calm down.*

25 *The 2nd Officer stated that if the Chief Officer had concerns with regards to the orders he should have called the Master and discussed his concerns with the Master in accordance with the Masters standing instructions...He stated at one point both parties were 'very unprofessional' although the Master seemed to show more composure..."*

30 57. The statement continued, with reference to the disciplinary hearing on the morning of 8 December:

5 *“The 2nd Officer stated that when he attended the disciplinary hearing the Master attempted to follow procedures and stated the Chief Officer had refused a direct and lawful order from the Master which is in breach of the North Star (Guernsey) Code of Conduct section 5.1(j) disobedience of a lawful order which constitutes Gross Misconduct. The Chief Officer had responded by asking the Master where he achieved his qualifications, which resulted in creating another ‘flashpoint’. When it was asked who seemed the most agitated of the two prior to the meeting it was confirmed that the Chief Officer was visibly agitated, the Master*
10 *seemed to remain calm until his qualifications and his competency were called into question. The 2nd Officer had conveyed, prior to the meeting, that if the Chief Officer apologised he would accept and no more would be said. The heated exchange during the meeting highlighted that this was not going to happen and the situation had regressed beyond*
15 *conciliation.*

It was conveyed that the Master then dismissed the Chief Officer from the vessel. The Chief Officer was dismissive of the proceedings and laughed before walking out of the meeting. The meeting was concluded by the Master and all other parties present signed the documents as
20 *witnesses to be forwarded to the office.*

Johannes was asked if he had witnessed the Master fishing from the vessel to which he stated no. He was also asked if the Master had to his knowledge ever falsified Drills or Exercises in the vessels logs this was also answered no.”

25 58. The report included a statement by Alexander Laird, the watch keeper (134). He stated that he had arrived later than usual on the bridge, and on arrival on the bridge he heard the raised voices of both the Master and the Chief Officer and decided not to enter immediately. In his opinion, it had been an uncomfortable passage, and that both of the
30 parties were weary.

59. The statement went on to record:

5 *“The Watch Keeper attended the Disciplinary Hearing as a witness. His original observation was ‘one was as bad as another’. He later changed this to the Master remained calm initially and the Chief Officer was ‘agitated’. He also conveyed that the Chief Officer had stated to him that this was not going to be the end of the matter and he was ‘going to take this all the way’.*

10 *The Watch Keeper then went on to say that he saw the Chief Officer as a friend as he had been on watches with him and this may cause him ‘to be a wee bit biased’. He stated he always liked the Master to sail with and the Master promoted a feeling that he wanted the crew to work together using the term ‘extended family’.*

15 *Alex was asked if he had witnessed the Master fishing onboard the vessel to which he answered no. He was also asked if he had witnessed the Master falsifying records of drills and exercises this was also answered no...”*

60. At the conclusion of the report, Mr Duthie set out a number of “Findings” (136):

- 20 • *“The Master had left specific orders with the Second Officer to steer a course of 200 in an attempt to provide a more comfortable passage with the intentions of altering course to take the environmental forces on the opposite bow on his instruction. Decision made in the best interest of safety.*
- 25 • *The Master was monitoring the passage progress at regular intervals and was aware of the vessels track and CPA from the land.*
- *The Second Officer had passed on the Master’s instructions (this was confirmed by the Chief Officer in his own statement).*
- *The Chief Officer altered course immediately on taking over the watch. A decision he stated he had made in the interest of safety.*

- *Closest Point of Approach (CPA) at 200 to the land was 2 to 3 hours ahead, Buchan Ness at a distance of 0.5 miles.*
- *The Master stated he was intended giving the order to change course in timely manner.”*

5 61. In his “Conclusions” (137), Mr Duthie went on to express his views about the findings made:

- *“The initial altercation was caused by a misunderstanding and could have easily been avoided with enhanced communication. Both parties implied that the other had been the instigator. Once the Master conveyed his direct and lawful order personally, either the Chief Officer should have complied or request the Master take over the Bridge Watch. The aggressive manner in which he responded to the Master’s query was very unprofessional, unacceptable and fully warranted disciplinary action.*
- 10
- *All witnesses confirmed the Master had repeatedly requested the Chief Officer calm down. The Chief Officer continued to address the Master in what was described as an ‘aggressive’ manner.*
- 15
- *The Chief Officer’s act of further undermining the Master’s authority by refusing to accept the verbal warning left the Master with no alternative but to proceed to the next level of the disciplinary procedure. The Master stated that he would have taken the matter no further if the Chief Officer had apologised.*
- 20
- *The actions of the Chief Officer during the disciplinary hearing, rather than comply with the procedure he again undermined both the disciplinary procedure and the Master authority by questioning his competency and the validity of his Certificate of Competency.*
- 25
- *The Chief Officer had sent an incident report from the vessel utilising the Management Systems Incident Reporting Procedure constructed in accordance with the ISM Code, he then deleted all records of this*

onboard. This seems to have been an attempt to influence perceptions onshore. The Master stated that he never made an error of judgement and it was always his intention to order an alteration of course in a timely manner.”

5 62. Finally, Mr Duthie recommended that the claimant should be invited to attend an investigation hearing.

63. The report also attached a number of other statements to it, in addition to those taken during the course of the investigation.

10 64. On 15 December, the Master sent an email to Mr Duthie (139) attaching a further statement (140), in which he stated that the claimant told him that he was going to *“discuss my competency with his colleagues at the MCA, as well as with Director of North Star Shipping”*. This conversation, he said, took place after the refusal of his command on the bridge. He also said that he was not informed *“about prepared safety observation by Chief Officer, soon after sent was deleted from the ship’s computer system”*. Finally, he said: *“For me as captain, Chief Officer’s behaviour as my first deputy it was shocking to me, in my nearly 20 years of working at sea there has never been a similar behaviour”*.

15 65. Mr Ehrhardt also produced a written statement dated 7 December 2015, confirming his version of events (141). In addition, he responded to questions from Mr Duthie by email dated 20 December 2015 (142), in which he said, among other things:

“...I had no concerns with the course. Our position at 1600 (57°47.4’N 001°32.2’W) was far enough from land to not pose any risk.

25 *...I did witness a brief part of the exchange between the two parties, but do not remember a great amount of detail from it. when the master asked me to come to the bridge, both chief mate and master were engaged in a heated argument. The master then asked me what course he told me to steer and whether I had passed that information on to the chief mate. The chief mate agreed that the information had been*

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5 *passed on to him, but then referred to the chart and explained that the course would drift us too close to land. The master asked the chief mate multiple times if he was refusing the masters orders and why he had altered course. The chief mates replies were heated and not very professional, and as a reaction the master then issued him with a verbal warning.*

...I can confirm the chief mate did not treat the disciplinary hearing with appropriate respect.

10 *...Initially the disciplinary hearing was held in a calm manner as the chief mate and master tried to discuss the incident. Subsequently their argument sparked up again, during which the chief mate put the masters authority and qualifications in question before leaving..."*

15 66. On 29 January 2016, Ms Dos Santos wrote to the claimant to invite him to a disciplinary and grievance hearing on 3 February 2016 (144), to be chaired by Paul Craig. She listed the documents enclosed with that letter, including the investigation report, and then stated:

"The purpose of the disciplinary hearing is to consider the following allegations:

- 20 • *That you disobeyed a lawful order given by the Master on board, Capt. Slawomir Sobierajski, contrary to section 5.1(j) of the Company's Code of Conduct;*
- *That your reaction at the time of receiving the Master's order was inappropriate and unacceptable;*
- 25 • *That your conduct at the disciplinary hearing onboard the vessel on 08 December 2015 was unacceptable;*
- *That you sent an incident report from the vessel on 07 December 2015 without the Master's knowledge and then deleted all records onboard and that this amounted to an attempt to influence perceptions onshore and was inappropriate."*

67. It was also clarified that the claimant's grievance would be considered at the hearing.

5 68. On 2 February 2016, Ms Dos Santos wrote to the claimant (146) to make him aware of a significant issue which may affect him as an employee of the respondent, namely that due to the downturn in the oil and gas industry, there was a reduction in the crewing requirements of North Star Shipping. It was anticipated that approximately 68 employees would require to be made redundant across the fleet, and that the respondent was therefore entering into a process of formal
10 collective redundancy consultation with the UNITE union representative, commencing with a meeting which had already taken place on 27 January.

15 69. The disciplinary and grievance meeting took place as scheduled on 3 February 2016. Minutes of the meeting were produced and represent an accurate summary of the proceedings (149ff).

70. The claimant set out his views as to the allegations made against him. With regard to the allegation that he had disobeyed a lawful order, he said:

20 *"What I feel is that this is not disobedience of a lawful order because it is regarding safety. It is not anything regarding disobedience. It is running into land..."*

25 *See when I come on a bridge I take the watch from second mate. The second mate says Skipper said steer the course 200 and we are approximately two or three miles away from the original course line and we are drifting towards the land on my watch and we keep drifting because the wind was 140 and that is why I am saying this is not a
30 disobedience of a lawful order because this is safety, you tell me, North Star tell me, after the Master who is second in command it's me. Yeah? And if something happens with the master like a mental disorder or something like stress and if it took the wrong action, then who is the second person who asks for it, who North Star ask for it, they say Abid,*

the Master is mentally upset or under stress or something, Abid why you not take that action as second in command..”

71. He went on to explain the conversation he had with the Master on the bridge, in which he accused the Master of refusing to explain to him why he had insisted upon the course he had. Mr Craig asked the claimant whether the Master leaves any orders for him to say that if he were in any doubt as to anything on the bridge he could be contacted, to which the claimant replied yes. Mr Craig then asked him why he did not contact the Master in that situation. The claimant replied: *“Because I am not in doubt. I just applied small certain rate. If anything in doubt, I don’t understand. Like if anything, like we can see this type of situation every day, I explain to him if one ship is coming ahead I know what the rules should say. I am not in doubt, if one ship coming ahead and I call the skipper, skipper comes on the bridge, one ship ahead what should I do? And what would be his response, Abid you don’t know what the rules say about it?...”*

72. Mr Craig pointed out that witnesses had said that he was being aggressive, and asked him if this were the case. He said *“I am not being aggressive...I was raising my voice. Because he was shouting and I just tried to explain to him that he is shouting at me and I say oh just listen to me I am not shouting. I am not screaming I know he is the Master and he can do everything he wants but I explain to the skipper it is my watch and we are running into danger and he is not listening.”*

73. With regard to the disciplinary meeting on 8 December, the claimant said:

“...I am very disappointed with North Star again. Why the Skipper took the meeting on 8 December. Why the skipper calls for a meeting. I haven’t received any letter from the skipper. I went down to reception, one crew member sitting here, see on the report is showing this is a letter given to Abid at 6.00. I haven’t received anything like this....On that meeting when the skipper called me, he did not listen to anything

5 because it is between me and skipper. I tried to explain to him and now
in the report he says I challenged his certificate. No I use that work and
maybe you think this is a challenge? No. When I explain to him skipper
under STCW officer on watch is responsible. On my watch I am
responsible. I know you are a skipper. I am on a watch it is my
responsibility for safe passage of the vessel. And he say no, he not
want to listen to anything. I say skipper, I am taking action to avoid
collision, responsibility between persons, you can read this rule, nothing
10 in this rule says that this is a Master job, this is the only job, this is an
officers job, no. All responsibilities, he is not listening to me and I only
say skipper where did you pass your certificate. If you think this is a
challenge to certificate then I am guilty for this...

15 I said where did you pass your certificate only I say, I never challenged
him and I never say something like this. When I explain to him is that
the skipper under STCW law I operate ENG 359 meeting on that day
and he is not understanding anything. I say skipper if you are not
following North Star policy, not following anything and anybody, duties
under STCW what the rules say about it, what do you want to do?"

20 74. The claimant went on to say that he had sent "100s" of safety
observations without the knowledge of the Master. He denied that he
was the one who deleted the safety observation from the ship's
computer, and argued that he had no interest in doing so, and therefore
that someone else did it. He was unable to say who that was.

25 75. Mr Craig addressed the claimant's grievance. The claimant noted that
the witnesses had said they had not seen the Master fishing from the
vessel, nor seen him have barbecues on board, because "they lie".
Mr Craig suggested that as the safety officer, he could have raised that
matter with him. He also said that he could have used the Stop the Job
process, whereby an officer with a safety concern may insist that the
30 particular process is halted in order to report that concern. The claimant
replied: "What do you think like if a course like this on a bridge I say stop
the job. What do you think the Master should do, what do you think?"

76. Mr Craig asked the claimant why he had put in a safety observation about the shifting of course but not one about the fishing. The claimant then referred to a drill which the Master had entered in the logbook but had not done effectively, because the antenna which was being used
5 was not working. He suggested that if he had used Stop the Job he would have been dismissed or suspended from his job.

77. Following the hearing, Mr Craig produced a report dated 17 February 2016 (160ff).

78. Under the first allegation, that the claimant had disobeyed a lawful order
10 given by the Master, Mr Craig found: *“The Master’s order in my opinion was safe. The Master had given his specific order, the 2nd Officer who had been on watch prior to Mr Hussain stated that the vessel was in no imminent danger as they were 3 hours from the closest point of land. The Master intended giving the order to change course in a timely
15 manner. The Master’s standing orders also include ‘do not hesitate to call me at any time if you are unsure or in any doubt whatsoever. If in doubt call me out’. If Mr Hussain had been concerned or disagreed with the orders he should have alerted the Master. My understanding is that there are many conversions (sic) between Masters and subordinates
20 regards course and alterations during the trip. With regards the Stop the Job intervention, it could be argued when you leave Aberdeen port if you don’t alter course at some point you’ll hit Norway, this wouldn’t necessarily require a Stop the Job intervention. In my opinion this should not have required a stop the job, if it had he should have
25 informed the Master.*

In my opinion the Master’s order was lawful.”

79. Mr Craig found, in relation to the second allegation (that the claimant’s reaction at the time of receiving the Master’s order was inappropriate and unacceptable):

30 *“This is an argument that could have and should have been avoided. Because of the nature of the argument and some of the comments*

during the exchange I would consider it inappropriate and unacceptable conduct for a Chief Officer. It is unacceptable to address a superior officer, the Master, in this matter.”

5 80. With regard to the third allegation, that the claimant’s conduct at the disciplinary hearing on board the vessel on 8 December 2015 was unacceptable, Mr Craig found:

10 *“It could have been perceived during the argument that Mr Hussain was questioning the Master’s competence. This could have at this point been taken as disrespectful by the Master, leading to further disagreement. It would be seen as derogatory and very inflammatory.*

In my opinion, Mr Hussain behaved unacceptably by not treated (sic) the hearing with respect, witnesses stated that he had treated the hearing with contempt. He also left prior to the conclusion of the hearing and refused to sign acceptance of the aforementioned.”

15 81. On the fourth allegation, that the claimant had sent an incident report from the vessel on 7 December 2015 without the Master’s knowledge and then deleted all results onboard, which was an attempt to influence perceptions and therefore inappropriate, Mr Craig’s findings were:

20 *“Given the nature of the Safety Observation it was in my opinion inappropriate for Mr Hussain to submit this without the Master’s knowledge.*

It is not possible to conclude who deleted the records from the vessel, as it could have been anyone who has access to the computer and its systems.

25 *I think Mr Hussain was trying to report this incident and took the opportunity to suggest the Master lacked experience. I don’t think Mr Hussain would have put in a Safety Observation like this if there had not been the altercation on the bridge.”*

- 5 82. Mr Craig went on to set out his findings in relation to the claimant's grievance, which were that the grievance should not be upheld. He found that the claimant's allegations against the Master, in relation to fishing, barbecues and making false entries in the logbook, were unsupported by any witnesses or other evidence, and that while the Master and the claimant were both responsible for the altercation on the bridge, there was no basis upon which to justify the suspension of the Master, and in any event, the claimant should have obeyed the Master's order.
- 10 83. Mr Craig then wrote to the claimant on 22 February 2016 (179) to confirm the outcome of both the disciplinary and grievance allegations at the hearing. He concluded that the claimant was guilty of gross misconduct, having upheld the disciplinary allegations against him, and that he should be dismissed with immediate effect from 22 February 15 2016. He advised the claimant that he had a right of appeal against that decision, and if he chose to appeal, he should submit this to the Directors of the respondent in writing by 1 March 2016.
84. He also advised that the grievance was not upheld, and again that the claimant had a right to appeal against that decision by 1 March 2016.
- 20 85. The claimant decided to appeal against his dismissal, and against the decision to reject his grievance, and did so by letter dated 25 February 2016 (181).
- 25 86. He submitted that he did not disobey any order by the Master. While he was in charge of the bridge, he stated, he was fully entitled to make a "minor adjustment" to the course of the vessel. When the Master told him to return the vessel to its original course, he said, he explained the reason for the adjustment then agreed to the re-adjustment. He also disputed the finding that he had undermined the Master.
- 30 87. With regard to the grievance, he said he did not believe that the grievance had been fully considered. He insisted that he had not argued that the Master's order was unlawful, and accepted that the vessel was

5 “some hours away from running aground when I set a course to avoid running aground”. He suggested that there was no clarification in the Master’s order which would have avoided that danger. The Master’s insistence that he should not change the course set by the Master, together with the absence of any order as to how the running aground would be avoided, amounted to “an unsafe position on the bridge”. He suggested that the Master, by altering the course himself later, came to realise that his order had been unsafe.

10 88. The claimant also submitted that there was no investigation into his allegations of fishing, barbecues and “fake log book entries”.

89. On 29 February 2016, the Master was issued with a written warning for having engaged in prohibited fishing activities from the vessel, to remain on his record for 12 months (183).

15 90. On 4 March 2016, Ms Dos Santos wrote to the claimant inviting him to an appeal meeting on 15 March 2016, to be conducted by Ryan Dekker, Director of the respondent, by telephone conference call (184). The claimant replied on the same date (the invitation having also been conveyed by telephone to him) to decline that invitation (185). He gave no reason for declining to attend, though wished to be notified of the outcome of the appeal, and wished his letter of appeal to be taken into consideration by Mr Dekker.

91. Mr Dekker wrote to the claimant on 24 March 2016 (187) to confirm that he had considered the grounds of appeal, and reviewed the decision to dismiss.

25 92. He concluded that the claimant had disobeyed an order by the Master, and that his conduct towards the Master had been inappropriate for a Chief Mate. With regard to the grievance, he informed the claimant that an investigation had been conducted into his allegations about the Master, and that a written warning had been issued to him in respect of fishing from the vessel.

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5 93. Following the termination of his employment, the claimant has sought to find alternative employment, primarily as a Chief Officer of ERRVs (Emergency Response and Rescue Vessels). He presented to the Tribunal a number of documents in a Mitigation Bundle, to which reference shall be made by use of the prefix "M". At M43, the claimant set out 30 jobs for which he had applied after September 2016, though he maintained that these were only the jobs for which he received a response, and that he applied for many more. At M13, he set out a list of jobs for which he applied before September 2016, for none of which he received any response.

15 94. The oil and gas industry has undergone a reduction in capacity owing to the fall in global oil prices over the past 3 to 5 years. As a result, the claimant believes that opportunities are restricted and that fewer shipping companies are recruiting officers at the senior level to which he aspires and which he previously occupied.

20 95. He has attended the Job Centre each working day in order to continue to explore the vacancies he is seeking. Some of the positions which are vacant, and to which the respondent pointed the claimant, require bulk carrier experience, but the claimant lacks such experience and would therefore not be considered for such positions. His intention is to seek a position as Chief Officer on a vessel for which he is qualified and experienced, and to become a Master, which he described as "my dream".

25 96. The claimant obtained short term employment for a period of 3 months after the termination of his employment, with News 24, a newsagents' business, during which he earned £2,526.40.

97. He also received certain state benefits, in the following amounts:

- Jobseekers' Allowance - £1,766.87;
 - Working Tax Credit - £ 415.49;
 - Child Tax Credit - £2,685.31.
- 30

98. The claimant has not considered the possibility of seeking a lower ranked position on a vessel in order to resume his seagoing career, with the possibility of further promotion in the future.

Submissions

5 99. For the respondent, Ms Williams tendered a written submission, to which she spoke. The submission is summarised briefly here.

100. She submitted that the reason for dismissal was the claimant's conduct, a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996. She relied upon the evidence of
10 Mr Duthie and Mr Craig, and the affidavit submitted on behalf of Ms Dos Santos.

101. The respondent, she said, followed a fair procedure in reaching the decision to dismiss the claimant. She pointed out that the claimant sought to introduce a new allegation in further and better particulars presented at the commencement of the hearing, that the Master had
15 started the disciplinary hearing on board the vessel by dismissing the claimant from the ship. That allegation was withdrawn by the claimant, and therefore deleted, but the claimant still gave evidence to this effect, and suggested that the reason why he was at liberty to challenge the
20 Master's authority was that he was no longer subject to that authority. She pointed out that those assertions were not before the respondent when they took their decision to dismiss the claimant.

102. Dismissal from the vessel does not, she said, amount to dismissal from employment, and there was a full onshore procedure which followed this
25 hearing, to which the claimant takes no challenge. The claimant was given the benefit of a full investigation report, and was in a position to know the allegations against him together with the evidence relied upon in support of those allegations. He was also given the opportunity to defend himself against those allegations.

103. The respondent had a genuine belief that the claimant had committed acts of misconduct, and there were reasonable grounds for that genuine belief. This followed a reasonable investigation on the part of the respondent. Ms Williams observed that it is not for the Tribunal to carry out an investigation into the matter itself, but to consider whether the actions of the respondent met the standard of the reasonable employer in the circumstances.
104. She went on to argue that the sanction applied to the claimant, of dismissal, was, in all the circumstances of this case, within the band of reasonable responses open to a reasonable employer. Essentially, the respondent requires to rely upon seafarers acting in an appropriate manner and obeying the orders of the Master; this is necessary on board a vessel due to the potential risks to health and safety if orders are not followed. The claimant asserted that he had greater experience than the Master in deciding how to address the issue of safety, but the respondent disagreed with that assertion, and were, in Ms Williams' submission, entitled to do so.
105. The order was lawful, but even if it were not, the lawfulness of an order or instruction is not determinative of the fairness of the dismissal (**Farrant v The Woodroffe School [1998] IRLR 176**).
106. There is no inconsistency as between the treatment of the Master and of the claimant. The Master was issued with a written warning for fishing from the vessel. The claimant acted in disobedience to a lawful order. The circumstances are not the same. They were not, as Ms Williams put it, "truly parallel" (**Hadjiioannu v Coral Casinos [1981] IRLR 352**).
107. In the event that the claimant succeeds in proving that he was unfairly dismissed, she submitted that the claimant's contributory conduct should be taken into consideration and any compensation reduced by a significant percentage. In any event, the claimant has failed to prove that he has made reasonable efforts to mitigate his losses.

108. For the claimant, Mr Sheridan made an oral submission, and for the assistance of the Tribunal provided his handwritten notes.

5 109. He argued that the claimant did not disobey an order, but made a change to the course which was inconsequential, supported in evidence by Captain Ahmed. In any event, the order was not a lawful order, since the OOW is in charge even if the Master is on the bridge.

10 110. The claimant was, he submitted, dismissed for obeying a direct order, but it was never given directly to the claimant. This affects the reasonableness of the decision. He accepted that he should have called the Master, but that none of the situations set out at 172 were applicable. There is a need for constant vigilance and that was particularly so in the high winds and approaching shallow patch into which the vessel was sailing.

15 111. Mr Sheridan made much of the difference between 200° true and 200° over ground. Essentially, he said, in the conditions, the ship was being driven towards land. He changed the course in order to make the Master's order safer. He suggested that the respondent's evidence on this was "all at sea".

20 112. He argued that the evidence of the Master was completely unreliable. The redundancy letter makes it clear that the respondent was looking to get rid of people, and the claimant was told so by the Master as well. Mr Laird told the claimant in an email that the whole crew was worried about their jobs and had therefore perjured themselves about the issues of fishing, barbecues and false log book entries. He queried why the
25 Master was not called as a witness to these proceedings, and suggested that in the absence of any explanation it cannot be assumed he was unavailable. He may have been "unhinged".

30 113. The evidence does not support the contention that the claimant's behaviour towards the Master on the bridge or in the disciplinary hearing was inappropriate, and Mr Laird's evidence contradicted it.

114. The Master subsequently said that if an apology had been given by the claimant he would have let the matter rest. Why, asked Mr Sheridan, was the claimant not told about this?
115. With regard to the Safety Observation, it was not challenged that the claimant had sent such reports many times before without the Master's knowledge, and it could have been anyone who had access to the vessel's computer to alter its terms.
116. The claimant's evidence was credible and reliable, and his evidence should be preferred to that of the respondent's witnesses.
117. The Master was guilty, by contrast, of unreliable statements in the report. Mr Duthie was guilty of asking the Master to "ramp up" his evidence (139). The Master denied fishing but the evidence of the claimant and Mr Laird demonstrated that he was lying about that. The claimant gave unchallenged evidence that the Master was telling lies.
118. Mr Sheridan posed a number of other questions, such as who sent the email at 5.20am on 8 December 2015, why evidence was changed or fabricated and why it was accepted that the Master gave accurate evidence when he was a "self-admitted liar".
119. The claimant was unfairly dismissed, he submitted, and there should be no Polkey reduction to his compensation.

The Relevant Law

120. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

“Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

5 (a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

10 (b) shall be determined in accordance with the equity and substantial merits of the case.”

121. We also referred to section 123(6) of ERA, which provides that “Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

122. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **British Home Stores Ltd v Burchell [1978] IRLR 379** and **Iceland Frozen Foods v Jones [1982] IRLR 439**, to which we were referred by the solicitors in submission. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

123. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant’s conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

124. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds us that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that “the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party.”

125. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

126. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:

(1) the starting point should always be the words of S.57(3) themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

5 *(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal*
10 *falls outside the band it is unfair.'*

Discussion and Decision

127. The issue in this case is clear: did the respondent unfairly dismiss the claimant for gross misconduct on the grounds which were presented to the Tribunal?

15 128. The Tribunal, in addressing this issue, requires firstly to consider whether the respondent has proved the reason for dismissal. In this case, the evidence demonstrates that the reason for the claimant's dismissal, following the investigation carried out, was related to his conduct. Although the Tribunal did not hear evidence from Ms Dos
20 Santos, the dismissing officer, there was reference to the letter of dismissal (179-80) in which it is clear that the reason for dismissal was that the allegations of misconduct against the claimant were upheld, namely, that the claimant had disobeyed a lawful order by the Master on
25 7 December 2015; that the claimant's reaction at the time of receiving the order was inappropriate and unacceptable; that the claimant's conduct during the disciplinary meeting conducted onboard the vessel on 8 December 2015 was unacceptable; and that the claimant sent an incident report form from the vessel on 7 December 2015 without the
30 Master's knowledge and then deleted all records onboard as an attempt to influence perceptions onshore.

129. I am satisfied that the reason for dismissal was related to conduct, a potentially fair reason for dismissal under section 98(2) of ERA.

130. Did the respondent have a genuine belief in the claimant's misconduct, and did they have reasonable grounds upon which to base that belief, following a reasonable investigation?

131. In my judgment, the respondent was entirely genuine in its conclusions. The claimant's solicitor sought to suggest that the Master had lied to the investigation and to the respondent, and that there might be other reasons why the respondent would wish to have the claimant dismissed from the organisation. It was noted that there was a redundancy consultation exercise being carried out by the respondent at around the same time as these events, but there was no indication that any decision was made about the claimant's involvement in that exercise, nor was there any evidence before the Tribunal on which any finding could be made to the effect that the real reason for dismissal was redundancy.

132. Mr Sheridan also sought to suggest, it appeared to me, that the respondent was somehow uncomfortable with the allegations which the claimant made against the Master, relating to fishing, barbecues and false entries to the log book, and that that provided them with the motivation to dismiss him. Not only was that hypothesis not tested before the Tribunal nor put to the respondent's witnesses, my judgment is that the respondent did not shy away from such allegations, and indeed investigated them. When the Master admitted that he had been fishing from the vessel in breach of the respondent's rules of conduct, he was issued with a written warning in respect of that conduct. Beyond that, there was no evidence before the respondent, other than the allegations made by the claimant, that the Master had been guilty of misconduct. None of the other crew members interviewed supported the claimant's allegations and therefore the respondent had no evidence, other than the claimant's allegation and the Master's admission in respect of fishing, that the Master was guilty of misconduct.

133. Mr Sheridan's submission appeared to amount to a theory that the respondent wished to deflect criticism from the Master by applying a severe sanction to the claimant. In my judgment, the claimant was dismissed on the basis of the allegations before me, and the respondent is content to stand or fall by the findings they made in relation to those allegations. It might be said that the claimant was himself seeking to deflect criticism from himself by seeking to point the respondent elsewhere. I do not conclude that the respondent was in any way looking for a reason to dismiss the claimant, as there is no basis upon which the evidence could support such a conclusion.

134. Although the Tribunal did not hear from Ms Dos Santos, the dismissing officer, and only had an affidavit from her which was of little evidential value in the absence of any cross examination of her in person, the letter of dismissal is in clear and unambiguous terms, and was not disputed by the claimant as being an accurate representation of the respondent's genuine beliefs at the time.

135. Accordingly, I am able to conclude that the respondent had a genuine belief that the claimant had committed acts of gross misconduct.

136. The grounds upon which the respondent had reached its conclusions require to be carefully considered in order to determine the reasonableness of such conclusions.

137. It is appropriate to consider each of the allegations in turn.

Allegation 1: that the claimant disobeyed a lawful order given by the Master on board, Captain Slawomir Sobierajski, contrary to section 5.1(j) of the Company's Code of Conduct.

138. The incident took place on 7 December 2015. The initial allegation levelled against the claimant, in respect of which a disciplinary hearing was conducted on board the vessel on 8 December, was that the claimant had disobeyed "a direct and lawful order".

139. The claimant asserted that the order was neither direct nor lawful; that he was the OOW and therefore entitled to take a decision which protected the safety of the vessel and the crew; and that he did not disobey the order at all.

5 140. The order was given by the Master to the Second Officer prior to leaving the bridge, to the effect that the course to be maintained was 200°. The Master informed the Second Officer that the Master wanted 200° to be steered (according to the claimant – 127). In my judgment, that was, in its simplest terms, an order issued by the Master to the claimant through the Second Officer, and there is no evidence which would persuade me that the order was not lawful. As to whether it was direct, it appears to me to be entirely academic; the order was issued by the Master to the claimant, through the Second Officer. Whether it was spoken face to face by the Master to the claimant or not, it was quite clear that the Master left the order with the Second Officer to convey to the claimant when he came to the bridge.

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141. A great deal of evidence was heard by the Tribunal about the circumstances in which the order was given, apparently for the purpose of seeking to undermine the validity or correctness of the order. The Tribunal is plainly not qualified to express a view about the circumstances in which the vessel found itself, but the evidence shows that the Master had a reason for pursuing that particular course in the conditions in which the vessel was experiencing, namely to give the vessel and the crew a slightly more comfortable passage for a time while that was possible.

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142. The fundamental difficulty arose here because the claimant insisted that the order was unsafe, and that as OOW he was entitled to act immediately to correct the course in order to ensure that the safety of the vessel was urgently attended to.

30 143. That explanation was undermined by the claimant's own evidence. He accepted before me that the vessel was not in immediate danger of

5 either collision or running aground. He suggested that in an hour or so there would be an imminent risk of hitting land, though the evidence generally from the other witnesses, and from Captain Ahmed, was to the effect that that risk would become pressing in perhaps two to three hours.

10 144. The claimant acted immediately by altering course. He did not contact the Master to check the reason for the order, as Captain Ahmed said in evidence he would have expected him to, nor did he wait for a period of time to establish whether the risk which he was anticipating would come to pass. In addition, Captain Ahmed, whose credentials were impeccable and whose evidence was balanced and measured, advised the Tribunal that changing the course by a margin of 4° would have made no difference at all to the safety of the vessel. He stated that he would have expected an alteration of some 20° to have been effected, in order to ensure the safety of the vessel. However, he also opined that the claimant could and should have made contact with the Master on appreciating his own concerns in order to discuss the matter.

15 145. As to whether, as OOW, the claimant had such authority that he could alter the course without seeking the Master's consent, the evidence does not, in my judgment, support the claimant's assertion that while OOW he had the entire control of the vessel. The Master is still on board, and is available to be consulted as Captain Ahmed suggested. The claimant said that he did not need to consult with the Master because he was not in any doubt, but the fact that he changed the order demonstrated clearly that he had a doubt about the order. He was sure he was right but he could not be sure that the Master would approve the change, especially, as it seems to me, a change which had such an insignificant effect.

20 25 30 146. The evidence demonstrates that the OOW is responsible for the safety of the vessel, but "as the Master's representative". Notwithstanding that the OOW bears a heavy responsibility while acting in that capacity, it is clear that he remains under the authority of the Master and any standing

orders given by him. Mr Duthie and Mr Craig, both experienced sailors, were of the clear view that the claimant had acted in disobedience to a clear order, and had therefore exceeded his authority as OOW. It is plain that the procedures, and the Master's standing orders, include a provision for calling the Master when safety is in doubt, and that reinforces the respondent's position that the claimant remains subject to the Master's authority even as OOW.

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147. Accordingly, the respondent had reasonable grounds on which to conclude that the Master gave an order to the claimant, through the Second Officer, and that as the claimant considered that that order was not safe or appropriate, he did not follow it. It is very difficult to avoid the conclusion, particularly in light of later evidence, that the claimant lacked respect for the Master's experience and knowledge, and considered that he "knew better" himself.

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148. In my judgment, the respondent had reasonable grounds to conclude that the claimant had disobeyed a lawful order by the Master. The claimant's explanations do not address the fundamental point that an order by the Master must be obeyed on board the vessel. It is not simply that the claimant questioned the order and sought to challenge the Master upon it, but that he acted in contradiction of the order at the earliest opportunity without taking any opportunity to seek the Master's views on the matter. His alteration of the course was insignificant and unlikely to have any real effect on the safety of the vessel, and the respondent was entitled to conclude that the claimant therefore disobeyed the order.

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149. Mr Sheridan and the claimant himself appeared to suggest that there was some justification for altering the course without reference to the Master. The Tribunal cannot accept that that would be an appropriate manner for the claimant to conduct himself towards an order legitimately issued by the Master of the vessel, who is given authority over all matters aboard. The claimant received an order from the Master; he did not carry that order out as instructed. In my judgment, the respondent

had reasonable grounds to conclude that he had disobeyed a lawful order.

Allegation 2: that the claimant's reaction at the time of receiving the Master's order was inappropriate and unacceptable.

5 150. When the Master arrived on the bridge to ask why the course had been altered, in contradiction of his order, the claimant reacted, in the respondent's views, in an unacceptable manner, resulting in the Master issuing the claimant with a verbal warning.

10 151. The Master gave a statement (73), which the respondent accepted as an accurate version of the conversation, in which he stated that the claimant had advised him that he was on watch and would do what he thought. The Master then reported that when he asked for the claimant's attention he "started yelling at me and threatening his colleagues from MCA and contact the office. You did not give me an opportunity to speak, on my requests to calm down, were unsuccessful..." He went on to say that when he was issued with the verbal warning, the claimant's conduct worsened and would not calm down.

15 20 152. Mr Ehrhardt and Mr Laird were officers who were also present on the bridge at this time. Mr Ehrhardt's statement, at 132, confirms that there was a heated exchange, during which the Master asked the claimant to calm down on a number of occasions, as he was shouting and being aggressive. He described the claimant as having "lost all reason".

25 153. Mr Laird indicated that he had heard raised voices as he approached the bridge but did not enter at that point.

154. The claimant's version of events was quite different, and he denied that he raised his voice at any stage.

30 155. In my judgment, the respondent was entitled to conclude that when asked about having changed the Master's order, the claimant reacted in a manner which was aggressive and loud. This was regarded as

unacceptable and inappropriate, and represented a clear challenge to the Master's authority.

Allegation 3: that the claimant's conduct in the disciplinary hearing on board the vessel on 8 December 2015 was unacceptable.

5 156. The claimant stated, in the course of his evidence, that the meeting on 8 December 2015 began with the Master advising him that he was dismissed from the vessel. The hearing then developed thereafter but he was insistent that this was the opening of the meeting.

10 157. I was required to address this point at the outset of the hearing, as it was directly related to the claimant's application to amend his claim to introduce that assertion into the pleadings. Following argument and discussion, the claimant's solicitor confirmed that he was prepared to agree the deletion of that allegation. However, the claimant still made the allegation in the course of his evidence.

15 158. No finding is made to this effect, partly because the pleadings do not offer to prove it, but also because in my judgment the evidence does not support it.

20 159. The claimant's position on the remainder of the meeting is difficult to discern. On the one hand, he denied that he had spoken in an inappropriate or unacceptable manner to the Master at the meeting; on the other, he said that since he had been dismissed from the vessel at the start of the hearing, he was at liberty to say what he wished to the Master, who no longer had any authority over him.

25 160. In my judgment, the respondent had reasonable grounds to decide that the claimant had spoken inappropriately to the Master during the course of that meeting. The Master stated (129) that having had the allegation read to him, the claimant immediately stated that the accusations were all lies, and then questioned the competence of the Master, before a further heated exchange.

161. Mr Ehrhardt gave a statement in which (132) he stated that the Master opened the meeting by attempting to follow procedure and asserting that the claimant had refused a direct and lawful order in breach of the code of conduct section 5.1(j), and that the claimant had responded by asking the Master where he had obtained his qualifications. The claimant was again described as agitated, while the Master was said to have been calm until his qualifications were called into question.
162. Mr Laird initially described the two individuals as being “one as bad as the other”, but later changed that description to saying that the Master remained calm initially and that the claimant was “agitated” (134). He did say that he liked the claimant and might be, in his own very candid phrase, “a wee bit biased”.
163. The claimant himself stated, in his meeting with Paul Craig (152): *“I tried to explain to him and now in the report he says I challenged his certificate. No I use that word and maybe you think this is a challenge? No. when I explain to him skipper under STCW officer on watch is responsible. On my watch I am responsible, I know you are a skipper. I am on a watch it is my responsibility for safe passage of the vessel. And he say no, he not want to listen to anything. I say skipper, I am taking action to avoid collision, responsibility between persons, you can read this rule, nothing in this rule says that this is a Master job, this is the only job, this is an officer’s job, no. All responsibilities... he is not listening to me and I only say skipper where did you pass your certificate? If you think this is a challenge to certificate then I am guilty for this.”*
164. In my judgment, it is quite clear that the claimant not only raised his voice again to the Master during this disciplinary hearing, but questioned where he had obtained his certificate. This was interpreted by the respondent as a challenge to the qualifications of the Master. It is difficult to see how it could seriously be suggested to be anything other than that. It was said in the context of a disagreement between the claimant and the Master as to whether or not the claimant had the full responsibility for the vessel while on watch or whether the Master

retained that responsibility. The claimant was, in the reasonable assessment of the respondent, not merely asking a question of the Master, or disagreeing with him, but seeking to undermine his authority by questioning his basic qualification.

5 165. On board a vessel, the Master requires to be given the respect and authority his position merits. The claimant not only challenged the Master's qualifications, and raised his voice repeatedly at him, but sought to do so in front of members of the crew, thus risking damage to the Master's authority with those individuals as well.

10 166. In my judgment, these actions were quite reasonably interpreted by the respondent as unacceptable and inappropriate, and compounded his earlier disobedience of the Master's order on the previous afternoon.

15 167. I do not accept that the claimant was dismissed from the vessel at the outset of the meeting on 8 December. He did not make such an allegation until late in the proceedings before the Employment Tribunal. He said nothing about this in the internal proceedings before the respondent. In any event, it appears to me that although the claimant might seek to argue that he was no longer subject to the authority of the Master after being dismissed from the vessel, he remained in
20 employment with the respondent and addressing the Master in such a manner before the crew was an act which the respondent would still have been entitled to view as gross misconduct by an existing employee.

***Allegation 4: that the claimant sent an incident report from the vessel on
25 7 December 2015 without the Master's knowledge and then deleted all records onboard and that this amounted to an attempt to influence perceptions onshore and was inappropriate.***

30 168. The claimant submitted a Safety Observation which was very critical of the Master's experience and knowledge, and did so without alerting the Master to the fact that he was doing so. He did so at 5.20am on 8 December 2015.

169. The claimant admitted that he had started to prepare a Safety Observation, but had saved it on the ship's computer and had not sent it. He then said that he only found out much later that it had been sent by email to Mr Goodlad. He was unable to explain to the respondent how it was that the Safety Observation was completed in terms which, as I understood from his evidence, were entirely consistent with his own view of the Master and his experience and qualifications. He was unable to suggest who else might have sent the document, and if so, for what possible motive they might have done so.

170. The evidence presented to the respondent was straightforward and clear. The respondent had reasonable grounds to conclude that the Safety Observation was sent by the claimant from the vessel to Mr Goodlad in terms which he himself completed, and that he subsequently deleted the information from the ship's computer in order to cover his tracks. The timing of the email sending the Safety Observation, after the incident but before the disciplinary hearing, meant that the respondent drew the conclusion, quite reasonably in my judgment, that the claimant was seeking to divert attention from his wrongdoing and shift it to the Master, in his own interests. It was reasonable for the respondent to take the view that the plain facts presented showed that he himself was responsible for the sending of the email.

171. In my judgment, the evidence given by the claimant on this point was quite unsatisfactory. His explanation stretched credulity beyond a reasonable point. It was perfectly understandable that the respondent came to the conclusion that he was the one who had sent the report and then deleted it from the ship's computer. It was reasonable for the respondent to reject the claimant's explanation as given both to Mr Craig and the Tribunal.

172. Accordingly, the respondent had reasonable grounds upon which to decide that the claimant was guilty of gross misconduct on this allegation.

173. It is therefore my judgment that the respondent had reasonable grounds to form the belief that the claimant was guilty of gross misconduct in relation to each of the four allegations it upheld against the claimant.

5 174. It is then necessary to consider whether the respondent conducted a reasonable investigation into these events. In my judgment, they did, and they followed a fair procedure in reaching their decision. They took statements from all of the relevant witnesses about the allegations made; they gave the claimant a full opportunity to understand and respond to the allegations; they provided him with a right of appeal
10 following the dismissal decision itself; and they considered carefully what he put forward in his own defence. They looked into the matter with thoroughness and care.

15 175. I found both Mr Duthie and Mr Craig to be entirely reliable and credible witnesses. They emerged from questioning as straightforward, experienced mariners who understood very clearly the need for relationships on board a vessel to be carefully maintained. They both found the claimant's conduct to be quite extraordinary, and said, as did the Master, that they had never experienced a Chief Officer behaving towards a Master in this way.

20 176. At one point it appeared to be suggested that Mr Duthie had been untruthful in his construction of the reports and information he provided to the investigation, when the claimant was giving evidence. When challenged on this Mr Sheridan appeared to concede that no such allegation was being made. For the avoidance of doubt, I found no basis
25 for any suggestion that Mr Duthie's handling of the matter had been anything other than proper and correct. I found him to be an impressive witness and an experienced, reliable professional. In any event, it was never put in cross examination to him that he had falsified information or been untruthful in his statements, which meant that he had no
30 opportunity to confront such an allegation. I therefore rejected any such suggestion.

177. Accordingly, it is then necessary for the Tribunal to consider whether the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer in all of the circumstances.

5 178. In my judgment, this decision fell well within that band. It is not for the Tribunal to substitute its own decision for that of the employer, nor to place itself in the position of the employer to imagine what might have been decided. It is for the Tribunal to consider, in all the circumstances, whether the respondent's decision to dismiss the claimant was reasonable.

10 179. This is a case in which the fundamental issue was whether the claimant had disobeyed a lawful order. I have found that the respondent have reasonably concluded that he did. That is plainly in breach of the respondent's Code of Conduct, and defined as an example of gross misconduct.

15 180. Discipline aboard a vessel such as this is critical to its proper operation. The Master is given the responsibility to secure the safe passage of the vessel, and the authority to ensure that his decisions are carried out by the crew, including his Chief Officer. By disobeying what was clearly a lawful order, and then not only arguing with the Master on the bridge, in
20 a hostile and voluble manner, the claimant was guilty of conduct which had the effect of undermining that authority.

181. The respondent has the responsibility for the operation of the vessel, within carefully regulated parameters, by which the Master and officers must be bound. In my judgment, they were entirely justified in taking a
25 very serious view of the claimant's actions. Had they not done so, the Master's authority would have been damaged unacceptably.

182. The claimant has sought to argue that he was treated inconsistently to the Master, who was not dismissed for having admitted fishing from the vessel, something which is prohibited by the respondent. In my
30 judgment, there is no inconsistency here. The claimant's actions were fundamental to the relationship between himself as the second most

senior officer on board and not only the Master but the crew; the Master's actions in permitting and engaging in fishing were seen to be much less minor in effect. I cannot interfere with that reasoning, which in my judgment is justified.

- 5 183. Accordingly, it is my judgment that the respondent did not unfairly dismiss the claimant, and that his claim of unfair dismissal must fail and be dismissed.

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Employment Judge: Mr Murdo A MacLeod
Date of Judgment: 02 March 2017
Entered in Register: 02 March 2017
and copied to parties

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