<u>IN THE SUPREME COURT OF NOVA SCOTIA</u>

Citation: Boutcher v. Clearwater Seafoods Limited Partnership, 2009 NSSC 107

Date: 20090403
Docket: SH No. 244471
Registry: Halifax

Between:

Cecil Boutcher and Clyde Knickle

Plaintiffs

v.

Clearwater Seafoods Limited Partnership,
a Nova Scotia Limited Partnership

Defendant

Judge: The Honourable Justice Douglas L. MacLellan.

Heard: November 3rd, 2008 to November 7th, 2009, in Halifax, Nova Scotia

Final Written Submissions: November 19th, 2008

Counsel: Grant Machum and Mark Tector, for the plaintiffs
Nancy F. Barteaux and Isabelle French, for the defendant

By the Court:

1. The plaintiffs Captain Cecil Boutcher and Captain Clyde Knickle claim against the defendant Clearwater Seafoods Limited Partnership (hereinafter referred to as the company or Clearwater) for wrongful dismissal. Both plaintiffs worked for the company for many years and the employment relationship ended in January 2005.

BACKGROUND

2. Cecil Boutcher is one of the plaintiffs. He is 59 years old and at the age of 15 after completing grade eight he went to sea. He became a captain on a scallop vessel in 1971 while working for Pierce Fisheries. He captained several vessels for that company until 1987 when the company was taken over by the defendant company. He continued to work for Clearwater until early 2005 when he left the company after being offered a different position. His last vessel was the Ocean Lady which he captained from 2002 to December, 2004.

3. Prior to that he was captain of the vessel A. E. Pierce. Both the Ocean Lady

and the A. E. Pierce are scallop vessels. The Ocean Lady was 130 feet long with a crew of about 19 men. A normal trip would be between eight to ten days at sea.

4. Captain Boutcher described for the court his duties as captain which was basically being responsible for the safety of the vessel and crew, seeing that the vessel was ready and fit to go to sea and that it caught scallops and returned safely to port.

5. This type of vessel was called a wet fish vessel which meant that the scallops were kept on ice at sea. This is as opposed to a frozen at sea (FAS) vessel which freezes the scallops on board at sea.

6. All the evidence before me is that Captain Boutcher was a good scallop vessel captain. He did his job well and knew where to find scallops. He did that based on his long experience catching scallops.

7. Captain Boutcher explained how a captain of the scallop vessel owned by the defendant was paid. The arrangement involved the captain getting four percent of the gross revenue derived from the sale of the scallops caught on any particular

trip. He then would get in addition a crew share. The crew share was determined based on the net total take after expenses of the trip. That net amount was divided with the company getting 60 percent and the crew getting 40 percent. The individual crew share was determined by dividing the total crew members into the net 40 percent amount.

8. The amount the captain and crew received was based directly on the amount of scallops caught and the going price for scallops at that particular time. The arrangement how a captain and crew are paid was a historical arrangement between the various companies that own scallop vessels and the captain and crew. Initially a captain received five percent of the gross stock but that was in later years changed to having the captain get four percent and the first mate getting two percent. Captain Boutcher said he was one of the first captains to agree to that more equitable arrangement.

9. Captain Boutcher worked for the defendant company from 1987 when it took over Pierce Fisheries until December 2004. He had worked for Pierce Fisheries since 1971 therefore in total his years of employment would be close to 34 years. He has asked in his Statement of Claim to be given pay in lieu of notice

based on 29 years of employment with the defendant company.

10. Captain Boutcher testified that he relationship with the defendant was a good one. He said that on December 4th, 1996 he received a letter from the defendant. It was introduced into evidence and it provides (Exhibit 1,Volume 1 Tab 9):

> "Dear Captain Boutcher:
>
> The current state of the fishing industry requires that our company become more efficient. Accordingly, during the next eighteen (18) months we expect to undertake a reorganization of our fleet which will involve the retirement from service of certain vessels. This reduction in our fleet will in turn reduce the number of vessel captains.
>
> In order to permit you the opportunity to plan and organize your personal affairs, it is appropriate that we give to you as much notice as possible of our plans. Accordingly, we hereby give you formal notice that your engagement as a captain (and in all other positions as well) with our company shall terminate and be at an end effective April 30, 1998, (unless otherwise sooner terminated)"

11. He said that following receipt of the letter he discussed his situation with Captain Mike Pittman the fleet manager with the defendant company. He said he was assured that he had no worries about his job and that because he had been there with the company for so long he would have a job after April, 1998.

12. On April 28th, 1998 Captain Boutcher said that he received a letter which advised as follows (Exhibit 1, Volume 1, Tab 12):

> "Dear Captain Boutcher:
>
> On December 4, 1996, you were given notice of the termination of your engagement as a Captain in the Deep Sea Trawlers Scallop Fleet effective April 30, 1998 (copy attached).
>
> The purpose of this letter is to formally confirm the termination of your engagement as Captain (and in all other positions as well) with Deep Sea Trawlers, effective April 30, 1998.
>
> You will be provided with a Record of Employment and any monies that may be owing to you, by April 30, 1998, or soon thereafter.
>
> It is unfortunate that the reorganization of our Fleet has been necessary, but conditions in the industry have required this.
>
> I want to personally thank you on behalf of Clearwater and Deep Sea Trawlers for the service you have provided to us over the years and wish you well in your future endeavours.
>
> Yours very truly,
>
> Peter Matthews
> Vice-President Fleet"

13. On that day he was called into Mr. Peter Matthew's office. He was vice-president of the scallop fleet for the defendant. He was presented with a 13 page agreement which he signed on April 29th, 1998 (Exhibit 1, Volume 1, Tab 14). This agreement was called a multi trip co-adventurer agreement and set out the way in which the captain was to be paid. It basically continued the historical unwritten arrangement by which a captain got four percent of the gross stock and also one individual crew member share. It defined the terms gross stock, net stock and gross crew share and individual crew share.

14. The agreement provided that the captain would participate in the company's medical, dental, drug plan and life and accidental death insurance. The cost of these benefits was to be shared on a 50 / 50 basis between the company and the captain.

15. Section 19 of the Agreement provided (Exhibit 1, Volume 1, Tab 14, Paragraph 19):

> "This Agreement shall continue in effect until terminated by either party in accordance herewith. Either party may terminate this Agreement at any time upon the giving of thirty (30) days written notice to the other party, such termination to be effective on the later of the thirtieth (30th) day after the giving of

such notice and the date specified in such notice; provided that:

(a) in lieu of giving such notice the Captain may pay to the Owner the sum of Five Thousand Dollars ($5,000.00) in full and final settlement of all of the Captain's obligations to the Owner hereunder excepting only the obligations of the Captain pursuant to Section 11 and 16 hereof; and

(b) in lieu of giving such notice the Owner may pay to the Captain the sum of Twenty-Five Thousand Dollars ($25,000.00) in full and final settlement of all of the Owner's obligations to the Captain under this Agreement."

16. Section 27 of the Agreement provided:

"Except as otherwise expressly provided herein, this Agreement may be supplemented, altered, amended, modified or revoked only by writing signed by each of the parties."

17. On April 30th, 1998 the defendant issued to Captain Boutcher a record of employment which indicated that he had been "terminated in accordance with prior notice" and set out his record of earnings from October 6th, 1997 to April 6th, 1998.

18. Captain Boutcher testified that in December 1999 he was advised that the earlier Agreement signed in April 1998 had to be varied because of an issue with National Revenue about income tax. He therefore signed a new Agreement dated December 30th, 1999 but effective as of January 1st, 1999 (Exhibit 1, Volume 1,

Tab 19) which was intended to supplement the earlier Agreement and deleted the reference to a co-adventurer arrangement and declared that the captain would be an employee of the defendant company. It provided that otherwise all the other terms of the earlier Agreement continued in force and effect.

19. In May 2000 Captain Boutcher received a letter from the defendant which advised of a new direction for the company. It was called "Leaving the past behind" and set out the intention of the company to acquire two new factory freezer scallop vessels with anticipated delivery dates of February 2001 and October 2001. The letter asked for applications for positions on the new FAS vessels.

20. Following receipt of this information about the new FAS vessels Captain Boutcher discussed his personal situation with Captain Pittman. He said he was told that as long as Captain Pittman was there he would have a job. He then applied for a captain's job on one of the new FAS vessels.

21. He was aware at that time that there were eight to ten captains on the older wet fish vessels and that each new FAS vessel required two captains to permit

alternating trips.

22. He said that he was not picked for either of the two new vessels but was advised that the company was anticipating acquiring two additional FAS vessels which would require four more captains.

23. Captain Boutcher continued to work as captain on the A. F. Pierce during 2000 and 2001. In January 2002 Captain Boutcher was presented with an Agreement (Exhibit 1, Volume 1, Tab 28) to reflect the fact that he was taking over as captain of the vessel “Ocean Lady”.

24. That Agreement was the same as the earlier Agreement signed by him in April 1998 in reference to the A. F. Pierce. It contained the same financial arrangements about the captain’s share of the gross stock and the crewmen’s share of net stock. It provided for medical benefits and the same termination clause (Section 18) of 30 days or $25,000.00 in lieu of notice.

25. A year later in January 2003 the relationship between Captain Boutcher and the company changed. On January 7th, 2003 he signed an agreement (Exhibit 1,

Volume 1, Tab 34) called a Single Trip Employment Agreement. It provided that he would be on board as captain of the Ocean Lady but only for one trip, that was from January 7th, 2003 to January 18th, 2003.

26. He duties were essentially the same as were set out in the previous agreements in reference to financial benefits, however, the agreement provided that the captain would not be entitled to participate in the medical benefits plan (Section 13) offered by the company.

27. The Agreement had no specific termination clause dealing with notice or payment in lieu of notice. It did provide by Section 24 as follows:

> "This Agreement constitutes the entire understanding, contract and agreement between the parties and supersedes all other oral or written understandings, agreements or contracts, formal or informal, between the parties or their representatives with respect to the subject matter of this Agreement. Without limiting the generality of the foregoing, the Captain hereby releases and forever discharges Clearwater Fine Foods Incorporated and all subsidiaries and affiliates thereof and its and their shareholders, directors, officers and employees, and its and their successors and assigns from any and all manner of actions, causes of action, debts, accounts, covenants, contracts, claims and demands whatsoever which the Captain has had, now has or which the Captain or his heirs, executors, administrators, successors or assigns or any of them hereafter can, shall or may have for or by reason of any cause, matter or thing existing up to the date hereof under any legislation, or contract, or in tort or otherwise, or for any other reason whatsoever with regard to the relationship at any time heretofore existing with respect to the Captain being the captain of or otherwise in any capacity whatsoever being an officer or member of the crew of the Vessel or of any other

vessel owned or operated by Clearwater Fine Foods Incorporated."

28. Captain Boutcher was asked if this first Single Trip Agreement was explained to him and he responded that he could not remember. He testified that he was not concerned about his job and that he was going to continue fishing as usual. He said that nothing really changed as a result of the Single Trip Agreement, he explained that he continued to sign the Single Trip Agreements for each trip he took on the Ocean Lady up to December 2004.

29. He said that during the period from January 2003 to December 2004 he continued to be covered by the company benefits despite the fact that the Single Trip Agreements indicated that he was not covered.

30. He said the normal practice was he would sign the Single Trip Agreement just prior to leaving on the vessel. That would normally be done in Captain Pittman's office. He was shown a number of the Agreements and acknowledged signing them. He said he clearly understood that if he did not sign the Agreements he would not be able to take the vessel to sea. He would not have a job.

31. Captain Boutcher said that around June of 2003 he became aware that one of

the captains of one of the FAS Vessels was leaving that position and he talked with Captain Pittman about getting his job. He said that he was asked which vessel he would prefer. At that point the company had the Atlantic Guardian and the Atlantic Leader in operation.

32. He said he asked Captain Pittman to put him on the Atlantic Leader for a training trip as mate. He went on that vessel but unfortunately during that trip while he was in charge a crewman was lost overboard. The vessel returned to port and the company was charged with a violation of safety regulations. He said he went off work for some time following that incident but later talked to Captain Pittman about going back to work. He was told that he was doing the right thing to get back on the horse so to speak. He signed a Single Trip Agreement on July 18th, 2003 as captain of the Ocean Lady. During the rest of 2003 and 2004 he continued on that vessel until the last Single Trip Agreement which was signed on December 7th, 2004 for the period from that date to December 19th, 2004. That was the last single Trip Agreement signed by Captain Boutcher.

33. In the fall of 2004 Captain Boutcher said that he had a conversation with Daniel Matthews who was general manager of the wet fish fleet at that time. He

said that Mr. Matthews discussed with him the possibility of going to Polland to take a new FSA vessel constructed there back to Lunenburg. They talked about him having to have a passport for that trip. He said that as a result of that conversation he got a passport.

34. Captain Boutcher said that he received a letter dated December 16th, 2004 signed by Daniel Matthews which indicated (Exhibit 1, Volume II, Tab 73):

> "Dear Crewmember:
>
> On behalf of Clearwater I wish you and yours safe and happy holidays. 2004 was by far not the easiest year we have ever had, but I recognise and appreciate the dedication and hard work you have shown. I thank you.
>
> The year 2005 will bring more changes to our offshore scallop fishing fleet. We are not expecting to fish any Wetfish vessels, and will be introducing two more factory freezer vessels to our fleet.

All employees of Wetfish vessels should receive their Records of Employment by mail over the next few days.

Hiring of crews for the new freezer vessels will start no later than January 15th with the announcements of the Captains and other vessel officers. Captains, with assistance from the Company, will hire all crewmen.

Training for the new vessels is expected to take place either late February or early March.

We in the Clearwater Fleet Division will begin working very early in the new year on crewing for these vessels And we would like to thank everyone that has taken the time to fill out an application also anyone who has not done so is encouraged to submit one no later than Jan 10 2005.

Best regards,

Daniel Matthews
General Manager"

35. On January 17th, 2005 Captain Boutcher was called to meet with Captain Keith Lohnes who had become Fleet Manager for Clearwater. He was given a

letter which offered him a new position as captain of a different vessel. It provided (Exhibit 1, Volume II, Tab 77):

> "Capt. Cecil Boutcher
>
> Dear Cecil:
>
> As discussed with you throughout 2004, the vessel that you had been assigned to command will not be fishing with the offshore scallop fishing fleet operating from Lunenburg as of her last landing in December 2004. As announced, Clearwater is adding two FAS vessels to the offshore scallop fleet and is not planning to operate any Wetfish vessels in the fishing effort of the future. As of the end of your last fishing trip in 2004, your employment relationship with Clearwater was terminated as per the Agreement signed at the beginning of the trip. We are unable to offer any further Single Trips with the offshore scallop Wetfish fleet.
>
> We are offering you the position of Captain of the Cape Keltic a fishing vessel that will be used for Research and Development, as well as Scientific Scallop Surveys for part of each year.
>
> In retaining your services as a Captain on this vessel we are prepared to guarantee an annual salary (to be discussed) each year research is carried out.
>
> We appreciate the need for you to consider the offer, and would like to receive a response by Wednesday, January 19th at 1600 hrs. at latest.
>
> We are hopeful you will continue to work with Clearwater in this new role, and look forward to hearing from you.
>
> Kind regards,

Capt. Keith Lohnes
Fleet Manager Scallop Operations"

36. He said he was surprised by this offer as he had understood that he would be offered a position on the new FAS vessel coming from Polland. He said that he took the letter home and consulted a lawyer. He wrote Captain Lohnes on January 19th, 2004 requesting clarification of the offer being made to him. On January 27th, 2005 Captain Lohnes wrote back outlining the proposal to him as captain of the Cape Keltic it provided (Exhibit 1, Volume II, Tab 80):

"Dear Capt. Boutcher

This letter is in response to your letter of Jan 19, 2005 concerning the offer of employment as Captain of the Survey Vessel, Cape Keltic. I will respond to each of your inquiries individually below.

Annual Income:

- This would be dependant upon the number of survey trips during the year and the number of fishing trips that may be required.
- The pay rate for the survey trips as captain would be $450.00 per sea day, with an allowance of one additional day of pay for each survey.
- The pay rate for the fishing trips would be on a share basis as it has been in the past. An estimate would be between $3000 and $5500 per trip, but as you are

aware, this will be dependent on the pounds landed.

- At the end of the first year we would review your employment and if all results where positive we would then be in a position to consider negotiating a salary for the following year for the survey work.

We anticipate,

- Three scallop surveys totalling 30 days at sea.
- One fishing gear survey totalling 15 days at sea.
- One clam survey totalling 30 days at sea.

We anticipate the starting time of the surveys to be in early May and to be completed in September of 2005. Any fishing trips that may be required can be expected to start in September of 2005 and could possibly continue until December of 2005."

37. Captain Boutcher rejected the offer as captain of the Cape Keltic and started this action in April 2005.

38. He said he did so because he felt he would only make about $33,000.00 under the new arrangement, when in 2004 his salary was $135,000.00.

39. He said he went on E. I. for a while and looked for other work as a captain. He was not successful and decided in March 2005 to purchase a lobster fishing license and boat. He did that and paid $165,000.00 to get set up. He said he had

expenses of $24,700.00 for the first year of the lobster operation and that his income for 2005 was a net loss of $5,600.00 from lobster fishing. He had employment insurance income of $17,300.00.

40. In 2006 his total income was $28,000.00 made up of $4,100.00 from employment, $15,600.00 from E.I. and $8,100.00 from lobster fishing.

41. On cross-examination Captain Boutcher was asked whether he was given the opportunity to consult a lawyer when he was presented with the agreement in April 1998. He responded that he was given that opportunity and that in fact he had spoken to a lawyer friend of his and that his advice to him was “sign the contract and go fishing or don’t sign and stay home”. He also acknowledged that the only person on behalf of the company that told him not to worry about his job was Captain Pittman.

42. He was asked about the letter from the company indicating that the wet fish vessels would be taken out of service and his position was that he really did not believe that would happen because of all the changes in the quota and the problems with the FAS vessels. He said that after the incident with the lost crewman on the

Atlantic Leader he took a month off work and when he went back to see Captain Pittman he was offered the job on the Ocean Lady because it's captain at that time was on suspension. He understood that once the suspension was up he would be assigned to the FAS vessel. That did not happen.

43. He said that after the Christmas meeting that year Captain Pittman indicated that there were two more FAS vessels coming and that he would be looked after at that time. He understood that to mean that he would get a job on one of them.

44. Captain Clyde Knickle is one of the plaintiffs. He testified that he is 61 years old and that he has worked as a captain on scallop vessels since 1988. He went to sea after completing grade seven in 1969.

45. He was working for C. W. MacLeod Fishery when it was taken over by Clearwater in 1982. Captain Knickle explained that the wet fish vessel he was captain of at that time was a non union vessel and that the crew were not in the union. When Clearwater took over there was a clear distinction made between union and non union vessels working for the company. He said that many times the company would favour the non union boats to keep the crew happy so they

would not consider joining the union.

46. The procedure for going on trips was similar to that followed by Captain Boutcher and that the trips were on average between eight to 12 days. His rate of pay as captain was the same as Captain Boutcher that is four percent of gross stock plus one crewmen's share.

47. Captain Knickle said that he got notice in December 1996 from Peter Matthews on behalf of the defendant indicating that his employment with the company would be terminated effective April 30th, 1998.

48. He said he talked to Captain Pittman after receipt of that letter and was assured that he would have a job after April, 1998. He said his status as a non union boat was important to the company and that for four years he had received the award for having the best quality catch.

49. He said that Captain Pittman used words to the effect that "as long as my big fat ass is behind this desk you will have a job".

50. In April 1998 he was called in as were all the captains and was told that he would be kept on as captain of the vessel Barbara Louise, provided he sign a contract with Clearwater. That contract was the same as the contract signed by Captain Boutcher in reference to the A. F. Pierce. It provided for his pay as part of the gross stock and for termination on 30 days notice or in lieu of notice $25,000.00 payable by the company to him.

51. He said he took the contract home and saw a lawyer before signing it.

52. He explained that the initial agreement was amended in December of 1999 to reflect the removal of the co-adventurer clause and to clarify that he was to be considered an employee by the company for income tax purposes.

53. In May 2000 Captain Knickle received the same letter from Captain Pittman about the advent of the new frozen at sea vessels and that the company was "leaving the past behind". He was not concerned about this new development because he thought that having a non union boat would separate him from the other crews. He discovered, however, that it did not work out that way and he was put on a union vessel and members of his crew were put on a union FAS vessel.

54. Captain Knickle said he was assigned to seven different vessels between May 2000 and January 2005.

55. Captain Knickle recounted a conversation he had with Captain Pittman about his future after he got the May 2000 letter about the change in approach by the company. He said that he was assured that since C. F. MacLeod Fisheries was the first company taken over by Clearwater that he would be protected. He said that Captain Pittman said to him that when he was ready to retire that he should come to see him. At that point he was 58 years old.

56. In January 2002 Captain Knickle was presented with his first single trip agreement. He was captain of the T. K. Pierce at the time. He signed the agreement and went to sea. He continued to sign similar agreements for each trip until December 2004. He understood that if the agreements were not signed he would not be leaving port.

57. Captain Knickle said that he had a conversation with Daniel Matthews while they took a drive in his truck. He was off work on compensation at the time and

that Matthews said to him “you’ll be taken care of Clyde”. Captain Knickle was off on compensation in January 2005 when he was called in to meet with Captain Lohnes. He was advised at that meeting he was not being offered any further employment with the company.

58. He said he asked Captain Lohnes about severance package and he replied that he should read the agreement signed earlier.

59. He said that his Blue Cross was cut off in March 2005 and that he had to pay for his medications after that.

60. Captain Knickle said that after his workmen’s compensation was cut off in April 2005 he applied for a number of different jobs. He was not successful. His income for 2005 was $13,200.00 from E.I. and $6,500.00 from workmen’s compensation benefits. He had no employment income in that year.

61. On cross-examination Captain Knickle said that when he worked for C. W. MacLeod Fisheries he had no written agreement and that his income was determined by how good the fishing was in a particular year. He said that

continued when Clearwater took over MacLeods.

62. He was asked if he got legal advice before signing the April 1998 contract. He said that the advise was “if you don’t sign you don’t have a job”.

63. He acknowledged that he knew that the contract he signed would apply to him and that he was aware of the termination clause in the contract.

64. He said that after he applied for a position on a FAS vessel and did not get offered one, nobody from the company talked to him about the lack of an offer. He said that he was aware that all the wet fish captains would not get positions on the new FAS vessels.

65. Captain Knickle indicated that his income for 2004 was $90,000.00 and in 2003 was $136,000.00.

66. He had income in 2002 of $144,000.00 and 2001 a high of $219,000.00.

67. He explained that his income in 2004 was reduced because he was injured in

the fall and went off on workmen's compensation.

68. Plaintiff's counsel introduced into evidence as part of the trial record discovery evidence taken from Captain Mike Pittman.

EVIDENCE FOR THE DEFENDANT

69. Captain Keith Lohnes testified for the defendant. He took over as operations manager for the defendant on December 27th, 2004. That was the position formerly occupied by Captain Pittman and Daniel Matthews. His main task on taking on the job was to decide what crew from the wet fish vessels would be transferred to the new FAS vessels. The applications for those positions were already on file. He said he reviewed the applications and made up a list of successful candidates. Captain Pittman approved all his picks. He picked four captains to man the two new FAS vessels.

70. On January 17th, 2005 he met with all the men and advised them of his decision. The successful captains were offered a multi trip agreement similar to the ones under which the plaintiffs worked from 1998 to 2002.

71. On that day he offered Captain Boutcher a new position on the vessel Cape Keltic. He made no offer to Captain Knickle.

72. He responded to Captain Boutcher's request for additional information on January 27th, 2005.

73. Captain Lohnes said on cross-examination that he was not aware of any conversations Mike Pittman might have had with either of the plaintiffs about on going employment. He said Captain Pittman knew what he was going to offer both plaintiffs prior to January 17th, 2005.

74. He agreed with counsel that it was reasonable for Captain Boutcher to request details of his proposed position on the Cape Keltic. He responded on January 27th. It took eight days to respond because he had to check out the information involved.

75. Captain Lohnes said that seniority did not play a part in the decision as to which captains were hired for the new FAS vessels.

76. Becky Langille testified. She had worked for the defendant for over ten years. She was assistant to Captain Mike Pittman charged with employee management. She looked after medical benefits for the crews on the wet fish vessels and the new FAS vessels.

77. She started work in May 1998 just after the new agreements were signed with the plaintiff.

78. Ms. Langille was present a number of times when the plaintiffs would sign their agreements.

79. She explained how the company would deal with the scallop quota once it was allocated. That quota would change during the year and the company would have to react by arranging for more vessels to catch any additional quota granted to the company.

80. She explained that the single trip agreements were started in January 2003 at which time the company had one FAS vessel, the Atlantic Leader, in service and

was awaiting the arrival of the Atlantic Guardian. She said that therefore the company moved to single trip agreements with the wet fish captains because of the uncertainty of how long these vessels would be needed.

81. Peter Matthews testified. He was vice president of fleet during the time involved in this action. He started that position in 1987.

82. He explained that in his early days there were lots of problems with how the scallop fleet was operated. The captains ended up with tax problems because of the way that they received their share of the gross catch. There were no contracts in place because the captains were considered co-adventurers with the company. He felt the company had to many vessels operating as a result of taking over small companies and the fact the scallop fishery was what he called a traditional operation. That determined how the ships operated. He looked for ways to improve the situation for all involved.

83. In December 1996 Mr. Matthews met with captains and mates working for the company and proposed a new arrangement for the fishery fleet, which he read from a script he had prepared for the meeting. He identified Exhibit 1, Volume I,

Tab 10 as that script. In contained the following:

"6.

NOW I HAVE GOT TO ADDRESS HOW WE CONDUCT OURSELVES IN THE FUTURE AND OUR RELATIONSHIP WITH YOU, TO RECOGNIZE WHERE WE STAND LEGALLY. YOU ARE ALL AWARE THAT THE CURRENT TREND IS FOR DIS-SATISFIED EMPLOYEES TO GO TO THE NEAREST LAWYER, WHO WILL PROMISE THE EARTH AND PROCEED TO SUE THE COMPANY, WITH SOME WINNERS AND SOME LOSERS.

NOT ONLY IS THERE A FINANCIAL CONSIDERATION BUT THIS IS A DISTRACTION AND A DRAIN ON THE COMPANY'S TIME IN RUNNING ITS BUSINESS.

7.

WE HAVE TAKEN THE BEST LEGAL ADVICE AVAILABLE ON THIS ISSUE AND THEREFORE WE ARE ISSUING YOU LETTERS OF TERMINATION, EFFECTIVE APRIL 1998, AFTER WHICH TIME WE WILL REVIEW OUR REQUIREMENTS AND YOU MAY SUBMIT YOUR APPLICATION TO FILL THESE.

8.

PLEASE UNDERSTAND THAT AS OF APRIL 1998 YOUR EMPLOYMENT AT DST IS TERMINATED, AND ANYTHING THAT HAPPENS AFTER THAT DATE WITH THOSE CAPTAINS AND MATES THAT WORK FOR US WILL BE ON A CONTRACTUAL BASIS."

84. Finally Mr. Matthew said in his script:

"- "DOES NOT WANT ANY AMBIGUITY WHEN PEOPLE LEAVE THE ROOM. TERMINATION IS ON APRIL 30TH 1998."

- CAPTAINS/MATES MAY RE-APPLY AFTER THAT DATE. WE WILL FILL OUR REQUIREMENTS ACCORDING TO OUR NEEDS AT THAT TIME. FUTURE EMPLOYMENT WILL BE UNDER CONTRACT."

85. Mr Matthews said that between December 4th, 1996 and April 30th, 1998 there was no change made in the company plans. He said some captains shared some vessels so that they would have some work.

86. In April 1998 Mr. Matthews was involved in preparing, with the assistance of legal counsel, the new contract under which certain captains would be offered employment with the company.

87. He signed the termination letters sent to both Captain Boutcher and Captain Knickle on April 28th, 1998 (Exhibit 1, Volumn I, Tab 11 and Tab 107) which referred to the earlier notification of termination in December 1996. These letters indicated that a record of employment would be issued to each of them. Both were thanked for the service they had provided to the company.

88. On April 28th, 1998 Mr. Matthews met with both Captain Boutcher and Captain Knickle at which time each was offered a new relationship with the company. Mr. Matthews once again prepared a script to refer to what was intended (Exhibit 1, Volumn I, Tab 13):

"TEXT

CAPTAINS AND MATES

> In December, 1996, Deep Sea Trawlers gave you notice that your past relationship with the Company would terminate on April 30, 1998.
>
> Effective Wednesday, April 30, 1998, therefore your existing relationship with the Company will be at an end.
>
> We now wish to establish a new relationship with you effective after April 30, 1998.
>
> We are pleased to offer to enter into this new arrangement with you as described in an Agreement, a copy of which we will give you to take away and read carefully. We suggest you should consult a lawyer to have your rights and obligations under this Agreement explained to you.
>
> You cannot sail with us again unless you have accepted the terms and conditions of this new Agreement. The vessel on which we wish you to be the Captain [Mate] is scheduled to said on Friday, May 1st;
>
> We look forward to our new relationship with you."

89. The agreement offered to each captain spoke about a relationship of co-adventurers with the company and provided that the captain would receive four percent of the gross stock and the equivalent of one individual crew share in respect of each trip. It provided (Clause 19) for termination by either party by giving 30 days notice or in lieu of notice by the payment by the captains to the company of $5,000.00 or by the company to the captains $25,000.00 as full satisfaction of the terms of the contract.

90. Mr. Matthews said that some captains were not hired back under the new relationship.

91. In 1999 Mr. Matthews said that as a result of a ruling from Revenue Canada the company had to change the contracts with both plaintiffs to remove the concept of co-adventurer and instead to make it clear that the captains were in fact employees of the company. To do that each captain signed a supplement to the earlier agreement.

92. Mr. Matthews explained how the company started to prepare for the elimination of the wet fish vessels with the advent of the FAS vessels. In October 1999 the first order was placed for a FAS vessel to be built in Spain. The projected time for construction was 16 months making it due in February or March of 2001. That plan did not pan out because of construction problems and the first ship did not go into service until June 2002.

93. In May 2000 Mr. Matthews along with Captain Mike Pittman, General Manager prepared the document called "Leaving the past behind" it was signed by

Captain Pittman and sent to both plaintiffs. It explained the companies position on the new ships due to come on board. It invited each to apply for a position as captain or mate on the new ships.

94. Mr. Matthews said that he was not as much involved with dealing whether each captain would be considered and relied on Captain Pittman to make that recommendation. He did know that the company did not plan on offering Captain Knickle a job on the new vessels. Captain Boutcher was to be offered one of the new positions.

95. Mr. Matthews said that the first freezer vessel the Atlantic Leader was put in service in 2002 after a further four month delay because of a design fault. In February 2003 the Atlantic Guardian came into service. However, in the spring of 2003 the company acquired a considerable amount of new scallop quota by acquiring some small companies and the decision was made not to phase out the wet fish vessels as originally intended but to keep them operating to fill the new quota.

96. On cross-examination Mr. Matthews agreed with counsel that Mike Pittman

had more responsibility for dealing with captains and men of the vessels then he did.

97. He said that when each captain was first offered the contracts in 1998 each only had two days to decide if they were going to sign up or not.

98. Captain Mike Pittman testified. He was general manager of the deep sea trawlers from 1993 until September 2003 when he became Vice President of Fleet for the company. He was the person most directly involved with dealing with the plaintiffs on behalf of the company during the period of 1993 to 2003. He reported to Peter Matthews. It was Mr. Matthews who handled the major meeting with captains such as the meeting of December 4th, 1996 arranging the new agreement with captains and the meeting of 1998 dealing with the new contract being offered to captains.

99. Captain Pittman said that after the company issued the letter dated December 4th, 1996 that Captain Knickle came to talk to him because he was concerned about his future. He said he told him that he was a good captain and produced good quality product and that while the company had made changes there would be new

rules and as long as he abided by the contract he had nothing to worry about.

100. Captain Pittman was asked if he had told Captain Knickle that the new contracts only applied to younger captains and he denied saying that. He said he definitely would not have said that to Captain Knickle.

101. He said that the period between 1998 and 2002 was an unsettled time for captains because of the changes being made by the company going to frozen at sea vessels and that a number of them spoke with him about what would happen to them in the future.

102. Captain Pittman said he was involved in deciding which captains and mates were placed on the first two freezer vessels. He said that one of the captains picked decided to not stay and Captain Boutcher was considered to replace him. He said he discussed the job with Captain Boutcher and he asked for a training trip on the Atlantic Leader. During that trip a man was lost overboard while Captain Boutcher was on watch and responsible for the operations at the time.

103. After that trip Captain Pittman said that Captain Boutcher asked to go back

to the wet fish vessel the Ocean Lady. He said Captain Boutcher never asked to be placed back on the frozen at sea vessels after that.

104. Captain Pittman said that in 2003 when the company got the new quotas it was scampering to get vessels to fish that quota.

105. In December 2004 Captain Pittman changed jobs to become Vice President of Fleet and left Captain Lohnes to decide which captain got on the freezer vessels. He also handled the interviews with both captains in January 2005.

106. Captain Pittman said he was aware that Captain Boutcher would be offered a position on the Cape Keltic. He also was aware that he refused that offer.

107. He said that despite the decision to down size from wet fish vessels in 2005 that the company did continue to use them. He said the Ocean Lady was in service in 2006. On cross-examination Captain Pittman was asked a number of questions about alleged comments he made to both captains about them continuing to have jobs despite the communications from the company indicating firstly in 1996 that all the jobs would be terminated and later in early 2004 about jobs when the freezer

vessels were being put into service. Captain Pittman did acknowledge that he made some commitments saying things like “as long as my fat ass is in the chair you’ll have a job” but that he meant that while there were wet fish vessels being operated and while he was in charge of deciding who would who captain the vessels they would have a job.

108. Captain Pittman also acknowledged that he was at one point considering Captain Knickle for a job on the frozen at sea vessel saying to him that he would look good in the wheel house of that vessel.

109. He agreed with plaintiff’s counsel that after the incident on the Atlantic Leader with the loss of the crewman that Captain Boutcher was not being considered by the company for a position as captain on one of these vessels. He also acknowledged that Captain Boutcher was never told that by him or anyone else from the company.

ISSUES

110. There are a number of issues in this case. Counsel for the parties have in their pre-trial briefs addressed what they consider to be the issues.

111. Plaintiff's counsel takes the position that both plaintiffs were wrongfully dismissed on January 17th, 2005 and that both are therefore entitled to pay in lieu of notice of termination. It is submitted that the court should decide the question of how much notice is reasonable by considering the entire period of employment by the plaintiffs with the defendant. For Captain Boutcher that would be 34 years between 1970 to 2004. For Captain Knickle 36 years between 1968 and 2004.

112. Counsel suggests that 24 months of pay in lieu of notice is appropriate considering the jobs held by the plaintiff, their length of service and their age at the time they were fired.

113. Defendant's counsel takes the view that while both plaintiffs worked for the defendant for many years prior to 1998 that in 1996 they were given 17 months of

notice that in April 1998 they would be laid off and that any employment after that was based on the written contracts of employment entered into by the plaintiff with the defendant. The last of these contracts, the single trip agreements signed in 2003 and 2004 requires no notice of termination based on the clauses in the contracts.

THE LAW

114. The law to be applied to an employment relationship after termination depends on the facts of each case. Where there is a written contract of employment its terms will most often dictate an employee's rights on termination. If there is no written contract the terms of employment must be established by other evidence from the parties.

115. If employment is for an indefinite period and there are no clear understandings about the employees right to notice of termination the common law will impose on the employer an obligation to give reasonable notice of termination or pay in lieu of such notice unless the termination is for cause.

116. There is no suggestion here by the defendant that the plaintiffs were

dismissed for cause.

117. In ***Machtinger vs. HOJ Industries Limited [1992] 1 S.C.R. 986***, the Supreme Court of Canada said:

> "19. The history of the common law principle that a contract for employment for an indefinite period is terminable only if reasonable notice is given is a long and interesting one, going back at least to 1562 and the Statute of Artificers, 5 Eliz. 1, c. 4. The Statue of Artificers prohibited employers from dismissin their servants unless sufficient cause had been shown before two justices of the peace: see S. M. Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis" (1982), 5 Comp. Lab. L.J. 85, at p. 88. By the middle of the nineteenth century, however, English courts were beginning to imply a term into contracts of employment that the contract could be terminated without cause provided that reasonable notice was given. Although it was initially necessary to prove the incorporation of a custom of termination on reasonable notice into the contract in each particular case, the English courts gradually came to accept reasonable notice as a contractual term to be implied in the absence of evidence to the contrary: M. R. Freedland, The Contract of Employment (1976), at pp. 151-54. In Canada, it has been established since at least 1936 that employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause: Carter v. Bell & Sons (Canada) Ltd., [1936] O.R. 290 (C.A.).
>
> 20. The parties devoted considerable attention in argument before us to the law governing the implication of contractual terms, and specifically to the relevance of the intention of the parties to the implication of a term of reasonable notice of termination in employment contracts. The relationship between intention and the implication of contractual terms is complex, and I am of the opinion that this appeal can and should be resolved on narrower grounds. For the purposes of this appeal, I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly.

> 21. This is the approach taken by Freedland, supra, who states that, "the pattern of contract now generally accepted and applied by the courts in the absence of evidence to the contrary is one of employment for an indefinite period terminable by either party upon reasonable notice, but only upon reasonable notice" (p. 153). The same approach was adopted by the Ontario Court of Appeal in Prozak v. Bell Telephone Co. of Canada (1984), 46 O.R. (2d) 385. Writing for the court, Goodman J.A. noted at p. 399 that, "if a contract of employment makes no express or specifically implied provision for its duration or termination, there is likely to be implied at common law a presumption that the contract is for an indefinite period and terminable by a reasonable notice given by either party ...". Basically, this is also the approach taken by I. Christie, in Employment Law in Canada (1980), at p. 347."

118. Applying these broad principles to this case I conclude that there are three periods of employment that must be considered in assessing whether the plaintiffs were wrongfully dismissed in January 2005.

119. The first period is the time between when each plaintiff started working for the defendant or a predecessor company taken over by the defendant up to and including April 1998.

120. The second period is the time between May 1st, 1998 to December 31st, 2002 during which time each plaintiff was employed under the multi trip agreement signed initially by each in late April, 1998.

121. The third period is the time between January 1st, 2003 and December 31st,

2004 while each plaintiff worked under a series of single trip agreements.

122. I propose to deal with each period of time and reach conclusions about said periods.

TIME EMPLOYED UP UNTIL APRIL 30TH, 1988

123. Both plaintiffs worked for the company for a number of years prior to April, 1998. Both were captains for scallop vessels in an industry which had well established traditional rules. These rules determined the captains income based on the success or failure of each fishing trip. The captain got a percentage, either five or four percent of the value of the gross stock along with a crewmen share. There were no written contracts between the captains and the company, the owner of the vessels.

124. Captain Boutcher started fishing with Pierce Fisheries in 1971. That company was taken over by the defendant in 1987 and the arrangement with the captain continued as it had in the past. Captain Knickle worked for C. W. MacLeod Fisheries prior to it being taken over by the defendant in 1982. I

understand his evidence to be that he worked as a captain since 1988 and started in the fishery in 1969.

125. Under the arrangement in place at the time captains were not considered employees of the company but co-adventurers. The company did not deduct income tax off the funds given to the captains. The rules governing their relationship were oral but each party knew what the rules were.

126. Peter Matthews described the arrangement as being traditional with many faults. There were no set standards for workmen's safety and working conditions were poor on many vessels.

127. As Clearwater expanded there was a clear effort to change the traditional arrangement. The basic terms of employment were retained with the captain being paid on the basis of a percentage of the value of the catch. The success of a particular vessel depended on the skill and the abilities of the captain. He knew where to find the scallops and he picked the crew to man his boat. Some captains were better then others and therefore received more income. Both plaintiffs here, I conclude, were good at their job and the company was glad that they were working

for it.

128. In December 1996 the company gave notice that each of the plaintiffs would be terminated in April, 1998. At that point both plaintiffs had worked for the defendant for more then ten years. They were given 17 months notice of dismissal. I have heard some evidence from the plaintiffs about discussions they had with Captain Pittman after they each received the notice of termination in 1996. It is submitted on their behalf that these discussions in effect cancelled out the written notice that they had received from the company and that therefore the period prior to April 1998 should be considered as part of the period of employment for purposes in determining the period for which they are entitled to reasonable notice or in this case pay in lieu of notice.

129. While I conclude that Captain Pittman did give to both plaintiffs some assurances about them having a job with the company after April 1998 I cannot conclude that such comments on his part can be construed as an alternative to the clear message being delivered by the written correspondence from the company.

130. In ***Lipczynski-Kochany v. Gillham [2003] O.J. 789*** the Ontario Court of

Appeal upheld a trial decision where the court found that a university professor who alleged that a two year term written contract position should not be enforced because of representations made to her at the time she signed the contract and that the term was really for 5 years.

131. The trial court in that case ([2001] O.J. 3509) held that in light of the clear words of the written contract evidence of oral representations made to the plaintiff should not be admitted into evidence based on the parole evidence rule. The court there went on to say:

> "56 Furthermore, even if the Court were to accept that the parties intended the contract to be expressed in both oral and written forms, there are still problems with the Plaintiff's allegations. As the wording of the written contract is clear and unambiguous, the Plaintiff is essentially arguing that she had a separate, collateral contract that guaranteed a minimum of five years employment.
>
> 57 The difficulty with this argument is that it violates the rules concerning collateral contracts. In Hawrish v. Bank of Montreal (1969), 2 D.L.R. (3d) 600 (S.C.C.), the Supreme Court held that evidence of a collateral contract was not admissible unless it was consistent with the main contract. In other words, as the Plaintiff's contract was reduced to writing, and this written contract formed the main contract, any oral collateral contract would have to be consistent with the written contract. Clearly, if Dr. Gillham represented to the Plaintiff that her employment was for a minimum five-year term, such representations would be completely at odds with the terms of the Plaintiff's written contract. Such a collateral contract could not be valid. As a result, the Plaintiff's argument in this respect therefore also fails."

132. The plaintiffs allege negligent misrepresentation on the part of Captain Pittman. To show negligent misrepresentation the plaintiffs would have to show that they relied in a reasonable manner on the said negligent representation. In ***Lipczynski-Kochany, supra,*** the court there said in paragraph 62:

> "62 Moreover, as I have already indicated, there was written documentation stipulating that the Plaintiff's employment was for a period of two years. The Plaintiff had a written contract with the University specifying a two-year definite term with a limited renewal clause. To my mind, this is a further answer to the Plaintiff's allegations of negligent misrepresentation. Even in light of Dr. Gillham's representations to the Plaintiff that he expected her employment to continue beyond two years, it would not have been reasonable for her to rely on this expectation in light of the clear terms of the written contract."

133. At the Appeal Court level the court dismissed the appeal and said:

> "(2) The trial judge did not find any misrepresentation as to the likelihood of employment beyond the fixed term. In any event, given the express language of the contract, or to the term of employment it would not have been reasonable to rely on any oral representation to the court."

134. On further appeal to the Supreme Court of Canada the application for leave was dismissed ([2003] S.C.C.A. No. 175).

135. In this case I conclude there was no negligent representation in light of the wording of the written contract.

136. I do find also that Captain Pittman at no time suggested that the notice of termination only applied to younger captains as suggested by Captain Knickle. Captain Pittman denied that he ever said that and I accept his evidence on that point. I do so mainly because such a position would be clearly contrary to the company position and he was closer to the company then both plaintiffs. I accept his position that he actually knew that both plaintiffs would be asked to stay on working for the company under the new arrangement because he knew they were both captains which the company would want as employees after April 1988.

137. It is clear from the evidence that the company wanted to protect its self from employees based on wrongful dismissal and proceeded therefore to give what it considered to be reasonable notice of termination. The company was dealing with employees who had worked for companies taken over by it and therefore possibly could claim that earlier employment against it if a particular employee was dismissed.

138. The two issues arising from this period of employment are whether the 17 month notice was in fact reasonable notice and if not does the decision made by

both plaintiffs to sign the new contract eliminate any rights they may have in reference to the employment prior to 1998.

139. In **Johnston v. Clearwater Seafoods Ltd., [2008] NSSC 128** MacDonald, J. of this court dealt with a case taken against the defendant here by a plaintiff who had worked for the defendant for a number of years prior to 1990 and after 1990 under single trip agreements similar to the single trip agreements used in regard to the plaintiffs here. He found that by signing the single trip agreements the plaintiff was estopped from later arguing that he had not received proper notice of the change in the employment arrangement. The court relied on a number of cases including ***Henley v. St. John's, City Of [1981] N.J. No. 184; Perry v. Ontario Die Co. 1986 O.J. 1867*** and ***Langley v. G.H. Wood Wyant Inc. [1998] N.S.J. No. 23*** as support for that position. In ***Henley Supra*** Goodrich, J. said at para. 3:

> "3. "The law on the matter is quite clear. Where there is a change in the terms of the employment, the employee may either accept it and continue employment or reject it and refuse to report for work. Condonation of the change constitutes acceptance. In Harris, Wrongful Dismissal, the author at pages 29 and 30, referring to the case of Lindsay v. Canadian Chamber of Commerce, [1977] 2 A.C.W.S. 367, said:
>
> "It is most significant to note that in all cases of constructive dismissal, the servant must quickly elect to consider the conduct of the Master as an act of dismissal by refusing to offer his services. Should he elect to continue in the

> employ, he will be said to have condoned the amended job description and hence will be estopped from relying upon the unilateral amendment as an act of constructive dismissal." See also Perry v. Ontario Die Co. 1986 Carswellont 2477."

140. I conclude that the contract offered the plaintiffs in April 1998 was significantly different from the arrangement under which they worked prior to that time.

141. Here the plaintiffs were faced in 1998 with a choice. Do they enter into a written agreement and continue working or do they sue for wrongful dismissal and allege that the 17 months notice was not reasonable based on their years of service and personal circumstances?

142. Both chose to sign the agreements offered them and they cannot now ask the court to consider the time prior to 1998 as part of the period of employment for which they are entitled to receive notice.

143. I also conclude that the period of notice given to the plaintiffs in 1996 with a termination date 17 months in the future could be considered within the range of reasonable notice based on their years of service at that point.

144. For purposes of this action I therefore conclude that only the period after April 1998 should be considered in deciding if the plaintiffs were treated fairly.

MULTI TRIP AGREEMENT

145. During the period May 1998 to January 1, 2003 the plaintiffs worked under a signed contract. That contract had a termination clause which provided that either party could terminate the contract by giving 30 days notice. It also contained a penalty for lack of such notice. If no notice was given by the company the amount of $25,000.00 would be payable to each of the plaintiffs.

146. In May 2000 the company notified the plaintiffs that the past would be left behind with the advent of the frozen at sea vessels and that they could apply for positions on the new vessels. That did not happen as anticipated and in early January of 2003 both were presented with single trips agreements which contained no notice requirement for termination or penalty in lieu of such notice.

147. Counsel for the company submits that by accepting the single trip

agreements the plaintiffs are estopped from asking for the benefits they would have had under the earlier multi trip agreement. Reference is made to Section 24 of the first single trip agreement in Exhibit 1, Volume I, Tab 34.

148. The situation at this point is quite different from the situation in April 1998. At that time the plaintiffs had received in December 1996 notice of dismissal. They knew that unless a new arrangement was agreed to they were out of a job. In December 2002 the plaintiffs were working under a written multi trip agreement. They had been advised about the new FAS vessels but they had received no formal notice of termination as required by the written agreement. They were asked to sign a single trip agreement which covered only a short period in January 2003.

149. Does the fact that the plaintiffs both signed a single trip agreement in January, 2003 estop them from claiming based on the multi trip agreements. I conclude that it does not. The change from the multi trip agreements between April 1998 and January 2003 to the single trip agreements which play out after January 2003 until December 2004 appears to have been done very quickly and without significant fan fair. Captain Boutcher said he could not remember whether he got any advice on the implications of the change. He indicated basically that it

was the same agreement and was not concerned that the new agreements did not have a notice of termination clause or pay in lieu of notice of termination. It was just understood that if the agreements were not signed he did not take the vessel away from the dock.

150. No attempt was made by the company to explain to the plaintiffs the significance of the change from contracts containing a termination clause to contracts requiring no notice of termination because in essence the single trip agreements expired automatically at the end of each trip.

151. I reject the suggestion by counsel for the defendant that the document "leaving the past behind" constituted notice of termination of employment under that contract.

152. I am not satisfied that by signing the single trip agreements the plaintiffs understood that their rights to notice of termination under the multi trip agreements were being given up. I therefore find that their rights under the multi trip agreements were still preserved after they signed each of the single trip agreements.

SINGLE TRIP AGREEMENTS

153. In January 2003 both plaintiffs were presented with a single trip agreement. Both signed and went to sea. They continued to sign single trip agreements up to the fall of 2004. Captain Boutcher's last one was signed on December 7th for the period between December 7th and December 19th, 2004. Captain Knickle's last single trip agreement was October 27th, 2004 for the period October 27th to November 6th, 2004. He sustained an injury during that trip and went on workmens compensation. That was his last trip as an employee of the defendant.

154. Counsel for the plaintiffs submits that both the multi trip agreements and the single trip agreements were not valid because of a lack of consideration.

155. Counsel refers to the case of ***Braiden v. La-Z-Boy Canada Ltd. [2008] O.J. No. 2314*** from the Ontario Court of Appeal. In that case the court dealt with a situation where the plaintiff had worked for the defendant company for 23 years. After 14 years he was presented with a written agreement which he was asked to sign which contained a clause that permitted the company to terminate him by giving him 60 days notice. He signed the agreement and worked under it for

another eight years. He was then terminated and the company used the 60 days notice period as compensation to him. The trial court found that the notice provision in the written agreement was not valid because it did not comply with the provincial statute entitling employees to notice upon termination.

156. On appeal the court held that the trial court was wrong in concluding that the agreement clause in regard to notice was invalid because of the employment ***Standards Act*** but found that the notice clause was void because there was a lack of consideration for the new agreement between the plaintiff and the defendant company.

157. The court summarized the issue as follows:

> "**Did consideration flow?**
>
> 51 A promise to do something that a party to a contract is already bound to do is not consideration. This was explained in *K.M.A. Caterers Limited v. Howie,* [1969] 1 O.R. 131 at 134 (C.A.):
>
>> A promise to do what the promissor is bound to do under an existing contract cannot be consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the so-called consideration is not genuine and is not sufficient to support a contract.

52 When Mr. Braiden became a sales agent for La-Z-Boy in 1987, there was no provision dealing with notice in the agreement between the parties, thus leaving common law reasonable notice as an implied term. In 1996, after almost a decade of loyal service to La-Z-Boy as a sales agent, Mr. Braiden signed the Agreement. The only substantive change to the parties' rights that came about as a consequence of entering into the Agreement related to the insertion of the termination provisions. The Agreement contained, for the first time, the Notice Provision stipulating that Mr. Braiden's employment could be terminated on sixty days' notice. Sixty days was less than that which Mr. Braiden would have been entitled to at common law. No clauses detrimental to La-Z-Boy's interests were inserted into the Agreement.

53 Under the Agreement, Mr. Braiden was obliged to continue to provide the same services as he had under the prior agreement and La-Z-Boy was obliged to give Mr. Braiden only that to which he was legally entitled under that prior agreement. Thus, on the face of the Agreement, there is no indication that Mr. Braiden received any consideration for giving up his right to reasonable notice at common law."

158. E. E. Gillese JJ. A. speaking for the court continued (Paragraph 55 to 61):

"55 La-Z-Boy counters by arguing that forbearance from firing constitutes good consideration. In support of this argument, it points to Mr. Braiden's testimony that he entered into the Agreement because he understood that he might otherwise lose his employment with La-Z-Boy.

56 It seems to me that this court's decision in *Hobbs v. TDI Canada Ltd.* (2004), 246 D.L.R. (4th) 43 (C.A.), rev'g [2003] O.J. No. 2646 (Sup. Ct.), is a full answer to this submission. In *Hobbs*, the appellant accepted a commissioned sales position with TDI. During the second week of his employmnet with TDI, he was required to sign a Solicitor's Agreement that changed his payment structure. The trial judge opined that the Solicitor's Agreement formed part of the original employment agreement. However, if the Solicitor's Agreement were a new agreement, he was of the view that consideration for it flowed in the form of "the continuation of employment", since it was clear that Mr. Hobbs' refusal to sign the Solicitor's Agreement would have resulted in the termination of his employment.

57 On appeal, Juriansz J.A., writing on behalf of the court, held that the trial judge erred. He held that the Solicitor's Agreement was an amendment of the original employment contract and that Mr. Hobbs received no consideration for it. In reaching this conclusion, Juriansz, J. A. reviewed a number of decisions of this court, all of which are the same effect: a change in the notice period is a significant modification of the employmnet agreement, additional consideration is required to support such a modification and continued employment does not constitute something of value flowing to the employee.8 At para. 32 of *Hobbs*, Juriansz J.A. explains:

> The governing legal authority in the circumstances of this case is *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (C.A.). Francis makes it clear the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relations as the consideration for the new terms.

58 The situation that Mr. Braiden faced is similar to that of Mr. Hobbs but even more compelling. In *Hobbs*, the appellant had only worked for two weeks before being presented with the agreement. Mr. Braiden had given fifteen years of loyal service to La-Z-Boy when he was told by his immediate supervisor that he was to sign the Agreement or lose his job. Both *Hobbs* and *Francis* make it clear that continued employment, in such a situation, is not consideration for the new terms of employment relationship.

59 I accept that if an employer provides consideration beyond mere continued employment, the employee may be bound by the modified terms of the agreement. *Techform* is a case in which additional consideration flowed. In *Techform*, the court found that the employer had implicitly promised the employee that it would forbear from exercising its right to terminate the employee for a reasonable period, thus enhancing the employee's security of employment.

60 There is no such finding in the present case. Indeed, there is no evidence on which such a finding could be made. La-Z-Boy chose to lead no evidence. The testimony of Messrs. Braiden and Douglas, which the trial judge accepted, was that he was given a choice: sign or lose your job. There is no evidence that he received anything that might be considered to amount to "enhanced security of employment". All that Mr. Braiden received for signing the Agreement was continued employment and, as previously stated, mere continuance of employment

> is not consideration.
>
> 61 Nothing in these comments is intended to suggest that it would not have been possible for La-Z-Boy to have entered into a fresh agreement with Mr. Braiden with a notice provision of the sort in question. However, at a minimum, in order to discharge the burden of establishing such a new agreement, La-Z-Boy would have to point to evidence that it clearly communicated the changes in the agreement that governed its relationship with Mr. Braiden, Mr. Braiden appreciated that he was giving up legal rights and consideration flowed for his forfeiture of those rights."

159. Applying the standards as set out by the Ontario Court of Appeal in Braiden, I conclude that in this case the change from employment under no contract that is the period up to April 1998 to the multi trip agreement signed by both plaintiffs at that time is not voidable because here the plaintiffs were given notice of termination in 1996. The consideration for the multi trip agreements was the fact that the company did not carry through on its right to terminate them based on the 16 months notice.

160. The situation is different, however, for the time after 2003 when the single trip agreements started. I cannot find any consideration for the single trip agreements except the fact that the plaintiffs would continue working but now under a contract with no entitlement to any notice of termination.

161. I would therefore find that the single trip agreements are void for lack of consideration and cannot form the basis for the company suggesting that the plaintiffs are not entitled to notice or pay in lieu of notice.

162. I also conclude based on ***Ceccol v. Ontario Gymnastic Federation, [2001] O.J. No. 3488*** from the Ontario Court of Appeal that the single trip agreements here are really a contract of indefinite term. In that case, MacPherson, JJ.A. of the court dealt with a plaintiff who worked for the defendant for a period of 15 years under 15 yearly fixed term contracts. The court found that the defendant could not rely on the fixed term contracts to not give notice of termination or pay in lieu of notice. The trial court there gave the plaintiffs 16 months pay in lieu of notice. On appeal the court up held that ruling. MacPherson, JJ. A. said at paragraph 24 to paragraph 27:

> "24 I conclude with this observation. Fixed term contracts of employment are, of course, legal. If their terms are clear, they will be enforced: see Chambly and Lambert, supra.
>
> 25 However, the consequences for an employee of finding that an employment contract is for a fixed term are serious: the protections of the ESA and of the common law principle of reasonable notice do not apply when the fixed term expires. That is why, as Professor Geoffrey England points out in his text Individual Employment Law (Toronto: Irwin Law; 2000), "the courts require unequivocal and explicit language to establish such a contract, and will interpret

any ambiguities strictly against the employer's interests". (p. 222).

> 26 It seems to me that a Court should be particularly vigilant when an employee works for several years under a series of allegedly fixed term contracts. Employers should not be able to evade the traditional protections of the ESA and the common law by resorting to the label of fixed term contract' when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship.
>
> 27 In the present case, Ceccol served the Federation loyally, professionally and continuously for almost 16 years. The Federation does not say otherwise. I cannot say that the contract which governed their relationship contains the "unequivocal and explicit language" necessary to establish a fixed term contract. I conclude that the employment contract was for an indefinite term, subject to renewal and termination in accordance with other provisions in the contact."

163. The plaintiffs in this case are I find similar to the plaintiff in that case. Both captains here served the company well. They did good work for many years and the company benefited from their skill at locating and catching scallops.

164. Recently the British Columbia Supreme Court dealt with a similar issue in ***Monjushko v. Century College Limited [2008] B.C. J. 102*** where the plaintiff was employed under 40 fixed term contracts over the course of nine years, each term contract covered a semester of teaching. He was then advised that he would not be offered any more contracts and he sued alleging that his employment contract was really a contract of indefinite term and that therefore he was entitled to pay in lieu

of notice of termination. The defendant defended based on the terms of the last fixed term contract.

165. The court found that the relationship between the parties was really a contract of indefinite term and relied on the ***Ceccol , supra,*** case to so find.

166. The court noted that in each of the 40 appointments that the defendant did not issue to the plaintiff a record of employment following each semester but did so at the point when he was not offered any contract.

167. Based on my finding in regard to each period of employment here I would conclude as follows:

> 1. The plaintiffs are not entitled to claim damages for wrongful dismissal for any period prior to April 1998.
>
> 2. The plaintiffs are governed as to any claims for damages by the multi trip agreements entered into in April 1998 and December 31st, 1999 and January 2002 for the period of employment between April 1998 and January 2003.
>
> 3. The single trip agreements entered into by the plaintiffs during the period January 2003 and December 2004 are not valid because of a

> lack of consideration and also because the contracts were really a contract of indefinite term.

168. It follows from these conclusions that the issue to be determined is whether for purposes of assessing possible damages for wrongful dismissal the court should simply extend the multi trip agreements which concluded in December 2002 to cover the period January 2003 to December 2004 and therefore assess damages based on that contract or should I assess damages for each time period considering the employment contract operating during said period.

169. Based on the facts of this case I conclude that it would be unfair to the plaintiffs to simply extend the multi trip agreements to cover the period January 2003 to December 2004 and award damages based on the termination clause set out in these agreements.

170. In January 2003 the company could have exercised its right under clause 19 to terminate the contract by giving 30 days notice and the plaintiffs would be entitled to no damages based on the wording of the contract. Instead of doing that the defendant brought into effect single trip agreements which avoided the necessity to terminate each plaintiff. That is what the defendant did in December 1996.

171. The single trip agreements were I find an attempt by the defendant to have it both ways, that is to eliminate the multi trip agreements by clause 24 of the single trip agreements and to avoid advising the plaintiffs that they were being terminated.

172. I have now found that the single trip agreements are not valid and therefore clause 24 does not operate to provide notice to the plaintiffs. I therefore conclude that no notice of termination has been given to the plaintiffs and they are both entitled to the set damages of $25,000.00 in lieu of such notice as set out in the multi trip agreement.

173. I also conclude that for the period January 2003 to December 2004 the plaintiffs were working without a written contract. That was a situation similar to their situation prior to April 1998. Therefore they are not governed by the terms of the multi trip agreement for that period but are instead entitled to reasonable notice of termination or pay in lieu of such notice.

174. I do that to achieve some form of fairness to the plaintiffs. Both of them had no control or input over what was placed before them as far as employment

contracts were concerned. The company was drafting the contracts and simply asking them to sign or not go fishing.

175. What is reasonable notice for that period? I have been given cases dealing with reasonable periods of notice. In the off quoted case of ***Bardel v. Globe and Mail (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at page 145*** McRuer C.J.H.C. said:

> "There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

176. The plaintiffs here are both older men doing a very significant job. They were intrusted by the company with control and responsibility for the scallop vessels and the 19 crew on board.

177. I conclude that a reasonable period of notice based on the two years of employment would be three months pay in lieu of notice.

<u>WALLACE DAMAGES</u>

178. The plaintiffs have claimed increased damages for bad faith on the part of the defendant. That claim is based on the case of ***Wallace v. United Grain Growers Limited [1997] 3 S.C. R. 701*** from the Supreme Court of Canada. There Iacobucci J. speaking for the majority said:

> "98 The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above...
>
> 103 It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself: see e.g. Addis, supra. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer."

179. In this case I do not see the kind of bad faith which would result in an additional award of damages. Clearly the company set out in 1996 to change its

relationship with it's captains. It wanted to down size the wet fish fleet in light of the changes in the industry. It set out to do that based on what it considered were its obligations to the captain who had worked for it for a number of years and who had previously worked for companies taken over by it.

180. The company was entitled to do what it did. The plaintiffs were entitled to test the legitimacy of the 17 month notice given to them in 1996 when they were terminated in 1998. The company was entitled to have their employees work under written agreements which contained termination clauses. The option for the plaintiffs was to refuse to work under these contracts and find work elsewhere. They chose to sign the contracts and continue working.

181. The only item of what might be called bad faith was the fact that Captain Boutcher was not told by Captain Pittman after the incident on the Atlantic Leader that he was no longer being considered for a position on the F.A.S. vessels. I do not however, find that should form the basis of Wallace claim in this case.

MITIGATION ISSUE

182. Both counsel agree that the burden is on the defendant to show a failure to mitigate.

183. In January 2005 Captain Boutcher was offered a job with the company. It proposed that he would captain the Cape Keltic. The proposed terms of employment were not initially disclosed. He asked for details of the job proposal and Captain Lohnes replied by way of a letter dated January 27, 2005 it contained details of the proposed position (Exhibit 1, Volume II, Tab 80).

184. Captain Boutcher rejected this proposal and in his evidence he explained that decision. He said he felt he would only earn about $33,000.00 if he took the job whereas he had earned $135,000.00 in 2004.

185. I conclude the decision to not take the job as captain of the Cape Keltic should be considered a failure to mitigate on the part of Captian Boutcher. While his concerns about what he would make were well founded he had operated for many years working as a captain in circumstances where the amount of income he got depended on many factors such as weather conditions, the availability of scallops and the availability of quota for the company.

186. He was being offered a job with a certain amount of certainty as far as the scientific side was concerned and while the number of actual fishing trips was uncertain it did have potential to produce significant income. The fact that the Cape Keltic had about 99 days fishing in 2005 in addition to the scientific work does confirm that potential. Captain Boutcher of course would not necessarily foresee that amount of fishing. If he had he probably would have taken the job as captain of the Cape Keltic.

187. I conclude that Captain Boutcher's failure to mitigate should disentitle him to any pay in lieu of notice based on the single trip agreements entered into from 2003 to the end of 2004.

188. I also reluctantly find that his failure to mitigate after January 2005 means that he has no entitlement to the $25,000.00 set out in the multi trip agreement.

189. His claim against the defendant is therefore dismissed.

190. Captain Knickle did not find alternate employment during 2005.

191. The company suggests that he failed to mitigate and I reject that. I am satisfied that he could not find work for the months after January 2005. He was on compensation until April of that year.

192. I award Captain Knickle the $25,000.00 based on the multi trip agreements and three months pay in lieu of notice for the single trip agreement.

193. Captain Knickle's income for 2003 was $136,000.00 or $11,333.00 per month. For 2004 he worked ten months and earned $90,000.00 or $9,000.00 per month. His average monthly income for the years 2003 and 2004 would therefore be $10,166.00 and therefore three months pay would equal $30,498.00 which I award him as damages.

194. His total award of damages therefore will be $55,498.00 plus interest.

COSTS

195. In light of my decision to award damages to Captain Knickle but not to

Captain Boutcher I would ask that counsel attempt to resolve the issue of costs by agreement. If that is not possible I would be prepared to hear both counsel on that issue.

MacLellan, J.