

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Maia Rota (Applicant)
AND Sea Products Limited (Respondent)
REPRESENTATIVES Peter Cranney, Counsel for Applicant
Robert Thompson, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 6 April 2006
SUBMISSIONS APPLICANT 25 April 2006
RESPONDENT 26 April 2006
DATE OF DETERMINATION 22 May 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Maia Rota, commenced her employment with the respondent in early March 2005 as a factory hand. Ms Rota was a member of the Service and Food Workers Union (“the union”) during her employment and was party to an individual employment agreement (“the employment agreement”).

[2] The respondent, Sea Products Limited (“Sea Products”) is engaged in the business of processing mussels.

[3] On 5 July 2005, a heated argument took place between Ms Rota and two other employees. Ms Rota was asked to leave the factory floor on several occasions by a supervisor at Sea Products, Sharleene Owen. Ms Rota was not prepared to accompany Ms Owen off the factory floor.

[4] Ms Rota was asked to attend a disciplinary meeting on 6 July 2005 to discuss the allegation that she had failed to follow a lawful and reasonable instruction.

[5] Following that meeting Ms Rota was summarily dismissed from her employment.

[6] Ms Rota says that her dismissal was unjustified. She seeks the following remedies:

- (a) Reinstatement
- (b) Compensation in the sum of \$25,000.00
- (c) Lost wages
- (d) Various recommendations under section 123(ca) of the Employment Relations Act 2000

(e) Costs

[7] Sea Products say that the dismissal was justified.

The Issues

[8] I need to determine whether the dismissal was justified both substantively and procedurally. A failure to obey a lawful and reasonable instruction can justify dismissal. Clause 5.6 of the employment agreement provides that the employee acknowledges their responsibility to follow all lawful and reasonable instructions of the employer.

[9] In this case it is necessary to establish the reasons for the dismissal and whether the instruction to Ms Rota to leave the factory floor and go with Ms Owen was lawful and reasonable.

[10] If the instruction was lawful and reasonable then I need to consider whether the refusal to obey was wilful disobedience or whether there was good reason for Ms Rota not to obey the instruction.

[11] I also need to consider whether the procedure adopted to investigate the allegation was fair and reasonable and in accordance with good faith obligations.

[12] Section 103A of the Employment Relations Act 2000 provides that whether a dismissal or action was justifiable must be determined on an objective basis by consideration of whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[13] If I find that the dismissal was unjustified then I need to consider the issue of remedies and whether there was contribution to the personal grievance by Ms Rota.

What happened on 5 July 2005?

[14] Ms Rota accepted that a statement she prepared shortly after the exchange on 5 July 2005 accurately set out what occurred prior to the instruction to leave the factory. I also heard from another employee Jane Noble who was working nearby and a union delegate, Denise Wells, who was also working nearby.

[15] During the afternoon of 5 July 2005 a comment was made by one of the workers that *Maia as an owner had no rights in relation to the running of the business*. Ms Rota has shares in Sea Products independently of her employment. Ms Rota asked a process worker Hayden who had made the comment. Hayden responded *Rihi*. When Ms Rota saw Rihi she asked her about the comment. Ms Rota records in her statement that Rihi became aggressive and abusive. Ms Rota records that in response she became *rebellious* and said things about reporting Rihi to the Board and that Rihi could not cope with her work. Rihi's partner Adrian then approached them and Ms Rota describes his approach as very aggressive, intimidating, harassing and abusive.

[16] During the exchange there is agreement that a team leader Elizabeth Trenuela came over when Ms Rota and Rihi were arguing. Ms Rota said that she could not hear what Ms Trenuela was saying as she has a soft voice and Ms Rota was wearing head phones. I accept at that point Ms Rota probably did not hear what Ms Trenuela was saying. Ms Trenuela did not feel comfortable dealing with the heated situation without guidance. She went to seek advice from Ms Owen about what she should do.

[17] I found Ms Trenuela to be a credible witness. I prefer her evidence about what happened following her seeking advice from Ms Owen to the evidence of Ms Rota.

[18] Ms Owen told Ms Trenuela to get the staff who were involved in the argument to come out of the factory. I am satisfied that Ms Trenuela asked both Ms Rota and Rihi to leave the factory floor and see Ms Owen about the incident. Ms Rota refused and I find that it is more probable than not that she told Ms Trenuela that she did not respect Ms Owen.

[19] Rihi did leave the factory floor as instructed and waited in the cafeteria for Ms Owen. Ms Trenuela then went to get Ms Owen to deal with the situation with Ms Rota and returned to work.

[20] Ms Rota said that she did not know Ms Trenuela was a key staff member. I accept Ms Rota's evidence on that matter although I do find that she knew Ms Owen was a supervisor and therefore a key staff member which is the description given to those staff who represent management.

[21] Ms Owen got her coat and boots from upstairs in order to come onto the factory floor. Her entrance and manner was variously described by the applicant and other witnesses as agitated, aggressive and worked up. Ms Owen did not accept that described her behaviour and general manner.

[22] After my questioning of witnesses and assessment of their various responses I do not accept that Ms Owen was aggressive. I accept that she was probably frustrated that Ms Rota would not leave the floor after having been asked by Ms Trenuela. I conclude that Ms Owen has a generally purposeful manner in dealing with issues on the factory floor and her approach on this occasion was no different to how she generally dealt with matters. I am satisfied though, that Ms Owen in control of her emotions when she was asking Ms Rota to leave the factory floor.

[23] Ms Wells told Ms Rota before Ms Owen came into the factory that she should not go upstairs without her (Ms Wells) being present. It was sensible advice although has to be considered in light of my findings about the nature of the instruction.

[24] In her written evidence Ms Rota said that if Ms Owen had approached her in a respectful and courteous manner then she would have gone with her. Ms Noble made a similar comment in her written evidence. The evidence that I heard does not support Ms Rota would have accompanied Ms Owen for reasons that I shall set out below.

[25] Ms Rota departed from her brief of evidence in respect of two significant matters.

[26] The first departure from the written evidence was where Ms Rota said that Ms Owen *demand*ed that she go upstairs there and then. At the investigation meeting Ms Rota told me that Ms Owen definitely did not say come upstairs the first time and said words to the effect *come with me*.

[27] That was consistent with Ms Owen's evidence and was significant because the flavour of Ms Rota's written evidence was that she thought she was to attend some sort of disciplinary meeting as the general manager's office is upstairs. I am satisfied that was not the nature of the instruction from Ms Owen and that she wanted Ms Rota to go with her, probably to the cafeteria, but in any event out of the factory to discuss the argument and sort things out.

[28] There is no good reason not to accept Ms Owen's evidence that because the factory is noisy there is a general policy at Sea Products if employees get into an argument in the factory to remove them from the factory floor, find out what went on and return them, hopefully, in a calmer state to work. That seems a good common sense approach.

[29] The second matter that I consider to be a significant departure was from the part of Ms Rota's written evidence where she said that she responded to Ms Owen's first request by saying *no, I want*

my solicitor present or a Union rep. Ms Rota then went on in her written evidence to say that *I was worried about going with her on my own.*

[30] Ms Rota made it clear to me that she would not have gone with Ms Owen as requested until she had had an opportunity to talk to Ms Wells. I asked Ms Wells if anyone had thought to ask Ms Owen if Ms Wells could accompany Ms Rota off the factory floor. Ms Wells said that the opportunity for exploring that had not arisen because Ms Rota would not leave the factory floor with Ms Owen.

[31] Ms Rota could not have been worried about going with Ms Owen on her own because the point of establishing whether or not Ms Wells was able to go with her was not reached. Ms Owen said that she would have had no difficulty with Ms Wells accompanying Ms Rota off the factory floor but Ms Rota would not leave the factory floor.

[32] In those circumstances I think it is unlikely that Ms Rota told Ms Owen she wanted her solicitor or union representative present. I prefer Ms Owen's evidence that Ms Rota did not say that in response to the initial request to leave the floor, but rather ignored the first request, or just said no, and then said to a further request that she would not go and that she had no respect for Ms Owen.

[33] Ms Rota said that she told Ms Owen that she did not respect her because of the way she was spoken to by Ms Owen and her refusing a request for a representative. Given my findings on what had taken place to that point I do not find Ms Rota's explanation for advising Ms Owen that she did not respect her plausible.

[34] There is no dispute that Ms Wells asked Ms Owen at that point, if she could talk to Ms Rota. Ms Wells said that the intention of her discussion would be to calm Ms Rota down. Ms Wells said that Ms Owen replied *no, she is to come with me.* Ms Owen said that she recalled Ms Wells said to her *let me try to get her out of the factory* and that she did refuse on the basis that it would compromise her position as supervisor. Ms Wells did not accept that.

[35] In most circumstances I would find that a fair and reasonable employer should let a union delegate persuade an employee to obey a lawful and reasonable instruction. Ms Wells's evidence, which I accept, was that she wanted to calm Ms Rota down rather than immediately try to encourage her to leave the factory floor with Ms Owen. I find that this was the first time a request was made for a discussion with Ms Rota. Significantly it was not a request from Ms Rota.

[36] I find it is more probable than not that Ms Rota did not intend to leave the factory floor as instructed by Ms Owen. Things had changed from Ms Wells initial advice to Ms Rota not to go upstairs without her. It had become apparent that Ms Rota wasn't going with Ms Owen. Ms Rota had told Ms Owen that she had no respect for her.

[37] I have to consider the nature of the instruction. It was simply to leave the factory floor to talk about an argument that had taken place. Ms Wells could have accompanied Ms Rota off the floor with Ms Owen. I have also taken into account for reasons I shall set out shortly that there was some time for Ms Rota and Ms Wells to talk together before the instructions moved to a more formal level.

[38] Looking at the matter in the round I am not satisfied that Ms Owen's refusal to let Ms Wells talk to Ms Rota is sufficient to render a lawful and reasonable instruction by a supervisor to leave the factory floor for a discussion unlawful and unreasonable. Although I accept that Ms Rota was upset after the argument I do not conclude from the evidence that she was in such an emotional state to be unable to comprehend the instruction and leave the factory floor.

[39] There is a dispute whether Ms Owen then left the factory floor to go upstairs and seek instructions about what to do next from Mr Skevington before returning back downstairs to try to get Ms Rota to leave the factory floor. Ms Owen said that she returned upstairs and asked Mr Skevington what she should do essentially after each refusal.

[40] Ms Owen said she took about 10 to 20 minutes before returning to the factory because she had to comply with health and safety requirements. Ms Rota and Ms Wells say that Ms Owen never left the factory until after she had given three instructions following a warning to Ms Rota that her position may be at risk if she did not leave the factory floor.

[41] After hearing the evidence I find that it is probable that Ms Owen left the factory floor at least once during the exchange to talk to Mr Skevington and obtain his advice.

[42] I have reached this finding based on Ms Owen's evidence that she had not dealt with a situation when an employee had refused one of her instructions. I do not consider it likely that she would otherwise have used the word insubordination when she gave Ms Rota a warning or asked for witnesses to the formal instruction. I do not find that these were things Ms Owen would have known to do or words that she would have used without the benefit of advice. Mr Skevington also recalled Ms Owen asking for advice from him.

[43] Mr Cranney in his submissions puts forward the view that perhaps Mr Skevington gave this advice initially before Ms Owen went onto the floor and that a statement of Ms Owen's did not suggest that she had left the floor.

[44] I think that it is less likely that Mr Skevington gave his advice to Ms Owen before she initially went onto the factory floor. Ms Owen had no real reason to believe that Ms Rota would not at that stage leave the factory floor. This is supported by her less formal attempts to get Ms Rota to leave the floor. I would have found Mr Cranney's argument more persuasive if Ms Owen had commenced with formal instructions.

[45] Ms Owen wrote her statement at the request of Mr Skevington. Seen in that light it is not so surprising that it makes no reference to the interactions she had with him during the giving of advice. Rather the statement concentrates on the instructions and refusals. I note for example the statement makes no reference to the comment that Ms Rota made to Ms Owen that she had no respect for her although there is no dispute about that matter.

[46] On her return to the floor some minutes later Ms Owen then explained to Ms Wells that she would ask Ms Rota three times to leave the factory floor and if she did not obey the instruction Ms Rota could *be suspended or fired for insubordination*. Ms Rota overheard this explanation.

[47] Ms Owen then asked Ms Trenuela and Ms Wells to witness the formal instructions and proceeded to ask Ms Rota three further times to leave the factory floor. Ms Rota refused to leave the factory floor answering *no* each time.

[48] Ms Owen then left the factory floor and went to see Mr Skevington who advised her to get Ms Wells and Ms Rota and bring them to him so that the matter could be discussed.

Meeting in Mr Skevington's office on 5 July 2005

[49] Ms Owen went back down to find Ms Rota and Ms Wells had left the factory floor and were in the locker room. Ms Owen asked that they go upstairs to see Mr Skevington. I find that Ms Rota and Ms Wells raised an objection to that on the basis that they had not had a chance to talk about things. Ms Owen said it would be in Ms Rota's best interest to go. Ms Wells then went to get Ms

Noble from the factory floor where she was working so that she could be present at the meeting in Mr Skevington's office.

[50] At the meeting Mr Skevington initially asked Ms Rota why she had not obeyed the instruction from Ms Owen.

[51] Ms Rota did not answer and said to Ms Noble and Ms Wells that she did not trust Mr Skevington so Ms Wells then spoke on her behalf.

[52] Ms Noble said that she thought some of the other workers had contributed to the prior events and Ms Wells asked whether they were going to be brought upstairs and questioned. Mr Skevington confirmed that the matter was about Ms Rota not following a lawful instruction.

[53] Ms Wells then advised Mr Skevington that Ms Rota did not want to talk to him until she could talk to a union official. The meeting was then adjourned until the following day. I am satisfied that Ms Rota understood the allegation to be discussed the next day was about the failure to follow a lawful and reasonable instruction.

6 July 2005

[54] Mr Ian Hodgetts, an experienced union official, attended with Ms Rota at the disciplinary meeting on 6 July 2005. Ms Wells and Ms Noble were also present. Mr Skevington was present as was Noeleen Evans the Administration Manager.

[55] Mr Skevington raised a matter at the start of the meeting about who was representing Ms Rota. That was resolved although I accept Mr Hodgetts' evidence that it meant the meeting commenced on a slightly sour note.

[56] Mr Hodgetts said he was aware it was a disciplinary meeting. At the start of the meeting Mr Skevington stated that he was investigating a failure by Ms Rota to follow a lawful instruction. Mr Hodgetts felt that there was a standard type discussion/opening and accepted Mr Skevington probably said that the matter could lead to dismissal although he could not recall the precise words used.

[57] Mr Skevington took some notes which were made available at the investigation meeting.

[58] Mr Hodgetts spoke on behalf of Ms Rota at the meeting. He explained that the union delegate Ms Wells was standing there and her offer of support and advice had been refused by Ms Owen. He referred to the argument that had previously taken place between Ms Rota and Rihi, Hayden and Adrian and said there was some stress at the time which was out of Ms Rota's control. Mr Hodgetts said that Ms Rota needed time to reflect and consult.

[59] Mr Skevington took a short adjournment. I find that during that adjournment he telephoned Robert Thompson as his notes reflect. This finding is consistent with Mr Hodgetts' understanding recorded in his written evidence that Mr Skevington telephoned Mr Thompson again at that point and the evidence of Ms Evans who was present with Mr Skevington during the adjournment.

[60] Mr Skevington said that he thought about what had been said during the adjournment. Mr Skevington felt there had been time for Ms Rota to talk to Ms Wells, and felt the number of instructions raised significant issues and employees *cannot just do what they like*. He said that he considered health/safety requirements in a business like Sea Products and the need to have employees follow instructions. He said that he considered the lack of respect for Ms Owen.

[61] Mr Skevington returned to the meeting and advised that Sea Products was dismissing Ms Rota summarily for serious misconduct.

[62] The fact of dismissal was recorded in a letter to Ms Rota dated 7 July 2005 along with the reasons as set out below:

Being issued with a reasonable and lawful instruction on three separate occasions by Liz Trenuela and Sharleene Owen (key staff) and after formal notification. You had clearly been advised of the consequences of disobeying the instruction 3 times (4 previous request to the formal requests) and answering no to Sharleene Owen. Further, you were advised of your right to representation to which you accepted.

Your advice to both Sharleene Owen and Mark Skevington the General Manager is that you do not respect Sharleene Owen as a Supervisor and refuse to follow her instructions. We review this as a breach of trust and confidence that must be maintained in an employment relationship.

Due to your failure to follow a lawful instruction, we were left with no alternative other than to terminate your employment with immediate effect.

Conclusions with respect to dismissal

[63] Ms Rota was aware of the allegation that she was facing on 6 July 2005, and was given an opportunity to provide explanations about the reasons for refusal to follow the instruction on 6 July 2005 and was represented in doing so.

[64] In *NZ Printing etc IUOW v Clark and Matheson Ltd* [1984] ACJ 283 Castle J held that:

Open and deliberate defiance to obey a lawful and reasonable instruction given by a person in authority clearly amounts to misconduct of a degree that may justify dismissal.

[65] I am satisfied that the instruction to Ms Rota to leave the factory floor to discuss matters leading to the argument was both reasonable and lawful. It did not require her to do anything contrary to law, was within her contractual obligations and did not demand the performance of an impossible or dangerous task – *Wellington Clerical Union v College Group Ltd* [1984] ACJ 315. Another employee immediately obeyed the instruction to leave the factory floor.

[66] One of the complaints Mr Cranney made in his extensive submissions was that there was a breach by Sea Products of schedule A of the employment agreement which provided under a heading *representation*:

At any stage, you are entitled to have representative working on your behalf, and we will work with you and that person to try to resolve the problem. We can also choose to have a representative working on our behalf.

[67] I am not satisfied that there was a breach of this provision. There was no evidence to support that Ms Rota could not have a representative. She simply had to leave the factory with Ms Owen and Ms Wells to talk about the earlier argument.

[68] Obligations of trust, confidence and good faith in an employment relationship go both ways. I accept that Ms Rota was upset because of the earlier behaviour, particularly of Adrian toward her and felt unsafe. Ms Rota needed to tell her employer about this and Ms Owen was asking Ms Rota to leave the factory floor to enable her to do that. Ms Rota was not facing any sort of disciplinary action. Sea Products would then have been obliged to make sure Ms Rota was safe.

[69] Schedule A also provides under a heading *Tell Us First*:

If you think you have a problem in your employment, then you must let your manager know immediately, so we can try and resolve it with you then and there. If you don't feel you can approach your manager, you can go to another manager you feel comfortable

[70] The main thrust of Mr Cranney's submissions is that there was no full and fair investigation to enable the employer to conclude that serious misconduct had occurred. He submits that the circumstances of the earlier argument should have been investigated along with the refusal to follow the instruction to leave the factory floor. He submits that the reasons for the dismissal were not put to Ms Rota and were different from those in the letter of 7 July 2005 and that the decision to dismiss was predetermined.

[71] Mr Skevington was questioned twice on the reasons for dismissal at the investigation meeting and he confirmed the reasons were set out in the letter of 7 July 2005.

[72] There was evidence at the Authority investigation meeting that at the meeting on 6 July Ms Rota said that she didn't have respect for the supervisors, or the manager and wasn't going to follow instructions. Ms Evans said she recalled Ms Rota saying that *she did not respect Sharleene or supervisors or management and she wasn't going to take instructions from them. The only person she would listen to was Foley.*

[73] Ms Rota, Mr Hodgetts, Ms Noble and Ms Wells said that no such statement was made. Ms Noble said that Ms Rota may have said that on the floor to the workers but not in the meeting on 6 July 2005. I find that it is less likely that this statement was made on 6 July 2005 by Ms Rota. If it had been, and Mr Skevington had relied on it, then it would have been in his notes and recorded in the letter of dismissal.

[74] Mr Cranney also submits that health and safety aspects were taken into account by Mr Skevington but not disclosed to Ms Rota. I do not accept that. Mr Skevington simply gave evidence that was a matter he considered in reaching his decision to dismiss and the view that you can't just do what you want in a factory. That of itself does not convert it into a reason for dismissal. It is a reason for the need to follow lawful and reasonable instructions.

[75] The earlier altercation, I accept, did not form part of the decision process.

[76] I am satisfied that the reasons for Ms Rota's dismissal were those in the letter of dismissal. It was open for Mr Skevington to conclude that the only real reason for the disobedience was the lack of respect Ms Rota had for Ms Owen and therefore for her instructions. When the decision to dismiss was made I am satisfied that the lack of respect and refusing to follow instructions was confined to Ms Owen. The final sentence of the letter is quite clear, that it is the failure to follow a lawful instruction that is at the heart of the dismissal rather than any prospective failure to follow a lawful instruction.

[77] It was open to Mr Skevington to find that Ms Rota's refusal to follow several instructions to leave the factory floor was not accidental or unintentional but deliberate and wilful. The instruction was clear and there was time for Ms Rota to talk to Ms Wells. This was not a situation where Ms Owen had refused to allow Ms Wells to accompany Ms Rota off the floor. Ms Rota was aware that she could be dismissed if she did not follow the instruction by Ms Owen to leave the factory floor. Ms Rota did not ask for another supervisor to talk to, she simply refused and said *no*.

[78] I am not satisfied that there were matters relied on that were not put to Ms Rota. This was not a complex allegation. Ms Rota and Ms Wells were both present for the duration of the exchange with Ms Owen and knew what had been said.

[79] I am satisfied that there was a full and fair investigation in the circumstances as to whether the instruction was lawful and reasonable and the explanations for not following it. I do not find that the employer in this case was obliged to investigate the circumstance of the earlier argument.

[80] There is no evidence for me to conclude that there was predetermination of the decision to dismiss. Mr Skevington considered the explanations given and then returned to give his decision after a brief adjournment. It is likely, I conclude that the additional writing on Mr Skevington's notes occurred at a later time after the personal grievance was raised.

[81] It was open to Mr Skevington to conclude that the misconduct was serious and overall the procedure adopted to investigate the allegation of failing to follow a lawful instruction was fair and discharged the obligation of the employer to act in good faith.

[82] I conclude for the above reasons that the decision of Sea Products to dismiss Ms Rota for the failure to follow a lawful and reasonable instruction on 5 July 2005 was one that a fair and reasonable employer would have taken given the circumstances.

Determination

[83] I find that the dismissal of Ms Rota was justified. She does not have a personal grievance and there is nothing I can do to assist her any further. The remedies she has asked for are not available to her

Costs

[84] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority