

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 84/07
5047349**

BETWEEN TERESA SEFO
 Applicant

AND SEALORD SHELLFISH
 LIMITED Respondent
 Respondent

Member of Authority: Paul Montgomery

Representatives: Peter Cranney and Sandra Moran, Counsel for Applicant
 Andrew Scott-Howman, Counsel for Respondent

Investigation Meeting: 27 February 2007 at Nelson

Submissions received: 6 March 2007 from Applicant
 7 March 2007 from Respondent

Determination: 24 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Sefo, claims her dismissal from her position as a Mussel Opener at the respondent's processing plant in Nelson where she had been employed for 13 years was not justified. The dismissal was for serious misconduct and followed a period of suspension pending the respondent's investigation of the allegations.

[2] The respondent denies that the dismissal was unjustified and further asserts that its representatives carried out a full and fair inquiry into the matter before arriving at its decision to dismiss Ms Sefo.

[3] The parties attempted to resolve their differences in mediation but were unsuccessful.

What caused the problem?

[4] The applicant's employment was governed by the Collective Employment Agreement between Sealord Shellfish and the Service & Food Workers' Union (the CEA) and was also subject to the company rules. Ms Sefo, as all other Mussel Openers, was paid on a piece rate basis.

[5] By way of context, the mussel openers stand alongside a table with a moving conveyor belt and open mussels. Each opener has a chute in front of him or her and opened mussels (with beard removed) are passed through those chutes. Each chute electronically counts the mussels that pass through it and in this way a count is kept of the number of mussels opened by each individual employee.

[6] Having travelled down the chute, each mussel lands on a product belt and a sample of each opener's mussels are checked randomly for quality. The system allows each mussel to continue to be attributed to its particular opener. If more than 3% of an opener's count is rejected by the quality checker, then that percentage is subtracted from the opener's tally for the day and thus affects the pay received for the day.

[7] On 5 June 2006, the Factory 2 product belt malfunctioned as a result of which the quality checker was unable to attribute mussels to particular openers. Ms Sefo was working opening mussels on that line when the belt broke and her position was Spot 1 at the top of the table (the hot end).

[8] The following day, Gavin Barr (Factory 2 supervisor) received a written statement from Wayne Gardner. The statement contains allegations about Ms Sefo's conduct on 5 June 2006.

[9] On 7 June 2006, Mr Barr received a written statement from Darren Anderson. The statement contained allegations about Ms Sefo's conduct on 5 June 2006.

[10] The respondent did not take action in relation to these statements at the time they were received as both complainants were offered the cover of confidentiality in relation to their complaints. On or about 23 June 2006, Mr Barr discussed the statements and in particular the restraint imposed on the respondent by the confidentiality, with both Mr Gardner and Mr Anderson. The respondent says both agreed to lift the constraint of the confidentiality and the company was then able to undertake its investigation. Accordingly, the complaints were handed to the Acting Factory Manager, Mr Tony Sedman. Later that same day, Mr Murphy (Factory Shift Controller) and Mr Barr approached Ms Sefo and Garry Kerr, the Union delegate. The company provided the applicant with the two statements and suspended her on full pay pending the investigation.

[11] Mr Kerr telephoned Mr Neville Donaldson, the Assistant National Secretary of the Union, who immediately went to the factory, met with Mr Murphy, Mr Barr, Mr Kerr and the applicant, and challenged the company's decision to suspend Ms Sefo. After some discussion, Mr Murphy advised that he was acting on the instructions of Mr Sedman and Mr Patrick Smith, the Human Resources Manager, and said he was unable to withdraw the suspension.

[12] Mr Donaldson then contacted Mr Smith whom he said refused to enter into discussion on the justification of the suspension and simply responded that the company had made its decision. While not accepting the situation, Mr Donaldson requested of Mr Smith that the company complete its investigations as promptly as possible and to establish a date for a meeting to be held with the Union and the applicant.

[13] On 6 July 2006, the respondent required the applicant to attend a meeting. Attendees at that meeting were Ms Victoria Reid, the company's legal adviser, Mr Patrick Smith, Mr Gavin Barr and Mr Lloyd Murphy. The applicant was represented by Mr Donaldson and Mr Kerr.

[14] At the heart of the matter was the allegation that at the time the belts had malfunctioned, the applicant had left her position on the belt, had approached several of her workmates and in particular Mr Anderson. Mr Anderson partially removed his ear muffs and said that at approximately 3pm the applicant told him to *go for it the product belt was stuffed*.

[15] In her evidence, the applicant says *as I was walking back to my stand I said 'the belt's fucked again ha, ha, fucking ha'*. She denies ever having said the words *go for it*.

[16] Returning to the meeting on 6 July 2006, it is clear there was debate over Mr Anderson's credibility and the conflict of the applicant's evidence over the incident. Ms Reid suggested that both Mr Donaldson and Mr Smith should go and ask Mr Anderson whether he was absolutely certain about the words that the applicant had used. Mr Donaldson asked if he would be able to question Mr Anderson but the request was declined and Mr Donaldson therefore declined the invitation to go with Mr Smith when he met with Mr Anderson.

[17] Later that day, Ms Reid, Mr Smith and Mr Barr approached Mr Anderson to ask him if he was sure about the previous statement he had made in his complaint. Mr Anderson told them that he was 50-60% certain of the precise words used by the applicant but could not be 100% sure.

[18] The meeting was reconvened and the respondent's representative advised the applicant that they had spoken with Mr Anderson and he had confirmed his statement.

[19] Mr Smith then told the applicant that the respondent had considered the appropriate disciplinary action and that she was being dismissed for a breach of trust and confidence.

The issues

[20] In order to determine the matter, the Authority needs to make findings on the following issues:

- Was the suspension of Ms Sefo fair in the circumstances of this case; and
- Did the respondent conduct a fair and full inquiry into the matter; and
- Was the respondent justified in finding that the behaviour, if it occurred, amounted to serious misconduct; and
- Was the employer justified to rely on the evidence of Mr Anderson in respect to the *go for it* phrase; and
- In the event that the dismissal was not justified what, if any, remedies are due to the applicant; and
- If the dismissal was not justified, did the applicant contribute to the circumstances giving rise to the dismissal and to what degree?

The investigation meeting

[21] The Authority was assisted by evidence from Ms Sefo herself, her partner, Mr Cuthbertson, Mr Kerr, Mr Anderson and Mr Donaldson. For the respondent, evidence was presented by Mr Smith (HR Manager), Ms Reid (legal adviser) and Mr Barr.

[22] I took the opportunity just prior to the luncheon adjournment to make a site visit to the factory to put the events in context. It was most valuable in assisting my understanding of the machinery in use and the opening and checking procedures.

[23] I also record my appreciation of those giving evidence before the Authority, and in particular to counsel who had focused the statements of evidence on the key issues to be considered. Their cooperation enabled the meeting to be completed in a day.

Discussion and analysis

[24] This matter came to the company's attention as a result of complaint made by Wayne Gardner. I set out his complaint below.

To Whom it May Concern,

Tuesday 6th-6-06

While I was opening yesterday afternoon, at approximately 3pm I observed Teresa Sefo approaching three other openers on the hot side of Table 2. When I got a lift home with one of the openers she had approached they told me she had said 'the belts are broken, go for it'.

At that time (approx 3.00pm) the half shell belts on that side of the table were not working properly, i.e. they were going in such a way that the openers on that side could not be checked. Her comment implies to me that she was telling these openers to cheat.

This behaviour from someone who is also a Union delegate is disgusting, and as a member of the Union I would not expect a delegate to act in such a way. Regardless of her reasons for doing this, I would expect her as a delegate to act professionally and not incite trouble amongst other workers.

I expect this matter to be kept confidential.

Signed Wayne Gardner

[25] The following day, the company also received a complaint from Darren Anderson. it reads:

To Whom it May Concern 07-06-06

I would like to back up the statement that was put forward by Wayne Gardner.

I can confirm that Teresa Sefo had approached me on line at approximately 3pm and told me to go for it the product belt was stuffed.

I expect this matter to be kept confidential.

Signed Darren Anderson

[26] In his evidence, Mr Anderson said that at the end of the shift he met his co-worker Wayne Gardner by his car as Mr Gardner has asked Mr Anderson for a ride home. He goes on:

About two minutes after we left Sealord Wayne asked me what Teresa was talking to me about ... I told him she had said the belts were stuffed and that I was pretty sure I heard her say 'go for it'.

Wayne said 'oh really'. He said she should not be saying that. I agreed with him. He said he would have her up about it.

I said 'don't say anything. I don't want it going any further and there is a chance I didn't hear her right'. I told him I was not 100% sure she had said anything. It was very noisy in the factory at that time.

[27] The following morning, when Mr Anderson was working he was summonsed to the office and when he arrived, Toni Sixtus, a chargehand, and Mr Gardner were in the office. Mr Sixtus told Mr Anderson that Mr Gardner had made a complaint and showed him the statement Mr Gardner had written. Mr Anderson said that Mr Sixtus asked him if that is what had happened and what had

been said to him, and Mr Anderson said *well yeah it did*. Mr Sixtus then asked Mr Anderson if he would write down a statement and accordingly Mr Anderson provided the document quoted above.

[28] The witness then went on to say that Mr Sixtus had told him that he could add a sentence about keeping it confidential if he wanted to *so that no one else could see it*. Mr Anderson said *okay. I was not expecting it to go further, so I added this to my statement and signed it*.

[29] At the heart of this matter is the question did the applicant, after advising a number of colleagues that the product belt was malfunctioning, utter the words *go for it?*

[30] Initially, the company was hamstrung by the request from both complainants that their complaints be regarded as confidential. On or around 23 June 2006, Mr Barr discussed the statements with both complainants and they agreed that their statements could be made available so the matter could be investigated. The complaints were then passed to the Acting Factory Manager, Mr Tony Sedman.

[31] On 23 June 2006, Mr Murphy, the Factory Shift Controller, and Mr Barr approached the applicant and Mr Kerr, the Union delegate. The applicant was provided with copies of the complaints and was advised that she was suspended on full pay pending the investigation. Mr Kerr contacted Mr Donaldson who then attended at the factory and attempted to persuade the respondent's representatives not to suspend the applicant, arguing that there was no contractual right to do so.

[32] In considering the issue of suspension and whether or not it was reasonable, I have had regard to Mr Barr's evidence which was:

To be able to investigate the statements, I knew I would need to go and speak to other people in the factory. Because all these employees work on factory lines, if I spoke to them either near or in the presence of other people, I thought they might feel peer-pressured to not give the true answers. Although I am not necessarily saying that Teresa would say anything to these people, I thought that her presence in the factory may influence the investigation and that it would be sensible to remove that factor.

[33] I have also borne in mind that later, when Mr Smith and Ms Reid went with Mr Barr to speak with Mr Anderson, they interviewed him in an area known as "the red line" which is an open area from which staff access the processing area. It is an area which I would describe as public in the sense of being the main thoroughfare through which staff enter the processing area.

[34] Having considered the suspension issue, I think it was one of those rare occasions where suspension was justifiable on the grounds I have given. What is not clear is whether or not these

reasons were put to Mr Donaldson who objected to the suspension on behalf of the applicant. His evidence seems to suggest that they were not.

[35] In order to investigate the complaints, Mr Barr undertook a series of interviews with people working on the shift in question. In his complaint, Mr Gardner had spoken of seeing Ms Sefo speak with three other openers who were working on the same side of the table as the applicant. On 23 June 2006, Mr Barr spoke with nine employees and later a further three who were unavailable on that day were interviewed as well. Of the nine interviewed on 23 June, only one, Heather Price, said she had been approached by the applicant and told that the belts were malfunctioning. Mr Barr's notes confirm that Ms Price took no notice of the comment and carried on with her work. None of the employees interviewed heard the words "*go for it*" nor did any indicate that the applicant was encouraging others to breach their obligations to the employer.

[36] Essentially, this left Mr Anderson as the only person to whom the applicant may have used the phrase in question.

[37] The respondent duly convened a disciplinary meeting on 6 July 2006. The company was represented by Mr Smith, Ms Reid, Mr Barr and Mr Murphy. The applicant attended with Mr Donaldson and Mr Kerr. Notes were taken by Ms Reid.

[38] The meeting began with Mr Smith reading the following allegation:

That on 6 June 2006 you observed that the belt was broken. You then told at least three other openers telling them 'the belts are broken, go for it'. The action was irresponsible and could have affected quality.

[39] Given the exercise undertaken by Mr Barr in interviewing those employees on the same side of the table as the applicant on the day in question, I find this statement of the allegation quite extraordinary. Mr Barr undertook his interviews on 23 June 2006 and none of those interviewed reported hearing the applicant say *go for it*. This effectively ruled out all but Mr Anderson as an employee to whom the words might have been said.

[40] The evidence provided by the minutes of the meeting are of assistance, particularly when read in conjunction with the evidence of Ms Reid, Mr Smith and Mr Donaldson. It is clear that after the allegation was put to the meeting by Mr Smith, Mr Donaldson said that before Ms Sefo replied to the allegation, he required all documents and written material in the company's possession which had not been provided as earlier requested. Following an adjournment the documents were provided and Mr Donaldson raised a number of issues the company needed to consider including the applicant's long service, good attendance record, a verbal warning in the

1990s and her good relationships with staff. He raised questions regarding Mr Anderson's credibility and Ms Sefo's consistent denial that she had said *go for it*.

[41] The minutes establish that Ms Sefo told the meeting that she did not say *go for it* and that she had spoken only to Mr Anderson and Ms Price. Another adjournment was taken for the company to consider its position. Ms Reid said that because Mr Donaldson had questioned Mr Anderson's credibility, the company representatives returned to suggest that Mr Donaldson and Mr Smith

*... should go and ask Darren whether he was **absolutely certain** that Teresa had said 'go for it'. Neville asked if he could question Darren and I think I said that in my view that wasn't a good idea because Neville has quite a forceful personality and we wanted to get at the truth and Patrick would be less threatening. Neville refused the suggestion ...*

[42] Ms Reid had told the Authority that *if it had not been possible to speak with Darren then I'm sure the respondents would have recommenced the meeting and dismissed Teresa for serious misconduct. To do anything else would have **felt wrong***. This witness also told the Authority that:

Patrick, Gavin and I went down to the factory to speak to Darren before going back into the meeting to give the decision.

Patrick talked to Darren, whilst Gavin and I listened. Darren said that he was 50% to 60% certain of the precise words that Teresa had said. He was absolutely sure that Teresa's motivation was to encourage him to leave the beards on the mussels so they could not be checked. He was also absolutely sure that he had not been joking with Teresa and that this was not the reason why she had said it. He told us that he did not have any ulterior motive in reporting Teresa. After Patrick had finished, I asked about the joke; Darren's incredulity at Teresa's sharing a joke with him was instantaneous, no one listening to him on the day would have doubted his honesty.

In my opinion, Darren was completely credible. He was not evasive at all and appeared to remember the day in question quite well without exaggeration. He was not 100% certain about the actual words Teresa had said but because Teresa had admitted to saying "the belts are fucked, ha ha, fucking ha", this seemed less important. What was in question was Teresa's intent and Darren was 100% sure about that. Also in question was Darren's credibility and we had no qualms about that after listening to him.

[43] In his evidence to the Authority, Mr Anderson said:

Teresa spoke to me on her way back to her position. I had my ear muff radio on at the time. When Teresa approached me I moved my ear muffs to one side of my head and leaned over ... Teresa did not get up onto my stand. She pointed towards the belt and said to me 'oh the belt's – the belts are stuffed'. I turned back towards the table and leaned over to look under the table at the belts and saw that the two belts were moving at the same time. As I was doing this, I thought I heard her say 'go for it'.

[44] When giving evidence to the Authority in relation to his statement, this witness said:

I finished my statement and went back to work ... Two weeks later Ben came to see me. He asked me if I minded the statement going to management. I said I did not mind ...

No one came to ask me about the statement after that time. The next I heard was that Teresa had been suspended.

[45] There is a discrepancy in the evidence regarding the meeting of Mr Anderson by the three company representatives at the red line on 6 July 2006. The three witnesses for the respondent all told the Authority that Mr Anderson had said that, regardless of the actual words used, he was sure that Ms Sefo was encouraging him to cheat. In cross-examination, Mr Anderson denied saying this.

[46] Mr Anderson told the Authority:

Then they asked me if she had said 'go for it', did I believe she was encouraging me to cheat? I said, yes if that is what I heard her say but I could not be sure that that is what she said. .

[47] Mr Anderson was also adamant that he did not lift the confidentiality provisions of his complaint but merely indicated that he was happy for management to look at it.

[48] On this particular issue, I have considered with care Mr Scott-Howman's submission that if the company's evidence on this point is preferred, there can be little doubt that it was justified in its conclusion that an event of serious misconduct had taken place. If, irrespective of the actual words used, Mr Anderson had understood that he was being encouraged to cheat, Ms Sefo would have committed a breach of her obligation constituting serious misconduct.

[49] I do not accept that submission because had the respondent interviewed Mr Anderson as part of the investigation process, it would have become aware that at the time whatever words were said by Ms Sefo to Mr Anderson, he had his head down under the table top belt, he had his radio playing in his left ear and had the right cup of his ear muff pushed back exposing that ear to the considerable noise which is a constant in that particular part of the workplace. In those circumstances, I can understand why Mr Anderson said he could not be absolutely certain that Ms Sefo had said *go for it*, and it does not follow that irrespective of whatever was said, Mr Anderson had understood that he was being encouraged to cheat. He is entitled to his subjective perceptions. However, I think it was unsafe of the company to conclude that Mr Anderson was correct in his perception when in fact he is unsure of exactly what he heard.

[50] In coming to this view, I have also considered the evidence of Mr Smith and Ms Reid. In response to a question on the 50-60% certainty issue, Ms Reid told the Authority that she was trying to avoid the uncertainty of phrases such as *quite sure* and *pretty sure*. That is why she was asking Mr Anderson to put a percentage figure on his certainty. She told the Authority that once

Mr Anderson had made his estimate at over 50%, she was satisfied that the decision to summarily dismiss the applicant was appropriate.

[51] Mr Smith, at para.63, had said:

*We were, therefore, prepared to give Teresa the benefit of the doubt and **would have changed our decision** if, when questioned face to face, Darren's answers created any doubts in our minds.*

[52] So, the key witness was questioned only after a decision had been made and in effect he told the respondent that he was not *absolutely certain that Teresa had said 'go for it'*.

The test

[53] The appropriate test to be applied is as set out in s.103A of the Employment Relations Act 2000. That test requires the Authority to question whether the company's actions, and how it acted, were what a fair and reasonable employer would have done in circumstances at the time the dismissal occurred. It is required to objectively evaluate whether the employer's actions are those of a fair and reasonable employer.

[54] In coming to its determination of this matter, the Authority wishes to reassure the parties that it has no difficulty in accepting the respondent's justifiably strict rules in respect of the standards it demands from its employees within the particular industry in which it operates.

The determination

[55] Having weighed the evidence before the Authority in a matter which is finely balanced, I find the applicant was unjustifiably dismissed from her employment with the respondent. My reasons for this determination follow.

[56] Mr Anderson was not interviewed during the investigation process but only after a decision had been made but not conveyed to the applicant. While I find Mr Donaldson's refusal to attend the red line meeting is puzzling, it was a decision open to him. His presence would have enabled him to challenge the respondent on the issue of Mr Anderson's certainty regarding what he had heard.

[57] The respondent's witnesses said that they sought absolute certainty of the precise words that had been spoken to Mr Anderson by Ms Sefo. Mr Anderson was clearly not absolutely certain of what had been said to him and yet the respondent relied on this in confirming its decision. Mr Smith advised the Authority that he had checked Mr Anderson's record with the company and discovered that he had had one warning but not for dishonesty. There was no evidence before the

Authority that the same check was done on the applicant's record nor was there evidence of the respondent considering other alternatives short of dismissal.

[58] The respondent relied on Mr Anderson's subjective perception of Ms Sefo's intention when its own interviews with staff clearly indicated that they had not been approached and the only one who was, Ms Price, was clear that the words were not said to her.

[59] Viewed objectively, I find the respondent's actions in dismissing Ms Sefo fall short of those of what a fair and reasonable employer would have done in the circumstances of this case.

[60] For the sake of completeness, I am of the view that the respondent ought to have advised Mr Donaldson of the outcome of the meeting with Mr Anderson as that may have provided the opportunity for Mr Donaldson to speak to the respondent's representative on the issue of the appropriate sanction to be applied. That said, I am of the view, in the light of Mr Smith's evidence in particular, that any submissions on penalty short of dismissal would likely have fallen on unreceptive ears.

[61] I am required, having made this finding, to consider whether the applicant has contributed to her dismissal and I find that she has. In this context, I agree with counsel for the respondent that in leaving her position at the table the applicant's conduct was at best imprudent. His submission is quite right in that the applicant should have remained at her position or, knowing the belts were malfunctioning again, should have approached her supervisor or the appropriate person to alert them. I accept the submission that these were not the actions expected of a senior and experienced worker in the situation facing her.

Remedies

[62] In her statement of problem lodged with the Authority, the applicant sought reinstatement to her position. She also sought payment of remuneration lost as a result of her grievance, compensation for hurt and humiliation and costs. At the request of counsel, I will reserve the matter of costs and turn my mind to the issue of reinstatement.

[63] Before reaching a decision on the reinstatement issue, I have carefully considered the submissions of counsel. The respondent argues that reinstating the applicant would involve considerable difficulties for the company. It also submits that in leaving her stand and behaving the way she did, Ms Sefo's behaviour fell short of an acceptable level. Also, counsel reminded the Authority that in reply to a question from Mr Scott-Howman, the applicant accepted that even if the

words *go for it* were not said, her saying *the belts are fucked again, ha ha fucking ha* could have been understood as encouraging Mr Anderson to cheat.

[64] For the applicant, Mr Cranney directed the Authority's focus to the evidence of Mr Smith and in particular his negative evaluation of Ms Sefo when considering the suspension prior to the investigation of the complaint. He also submits that throughout his evidence, Mr Smith made unfounded statements to damage Ms Sefo in the eyes of the Authority. The point is well made, and I have approached Mr Smith's evidence in relation to the reinstatement of Ms Sefo with considerable caution.

[65] In coming to a decision on this, I have weighed the submissions as to the practicality, including the contributory conduct of the applicant. Had I found no fault on Ms Sefo's part, I would have no hesitation in reinstating her. Her imprudent actions and derisory comments however, have given me reason to pause. Ms Sefo was a person whom the respondent had previously appointed as a chargehand in its wet fish plant, had been selected to attend a course for team leaders and supervisors, had been a fire warden for three years and in 2005 and 2006 was a staff representative in collective agreement negotiations with the respondent. These indicate that this was a person in whom the company had considerable confidence and of whom it could expect leadership when difficulties arose in the plant. The respondent says that trust has now gone and specifically because of Ms Sefo's actions on 5 June 2006.

[66] I find the respondent's argument to be well made out and I decline to reinstate Ms Sefo.

[67] The applicant seeks remuneration lost as a result of her personal grievance from the date of dismissal until the date of reinstatement – if it is awarded. Ms Sefo has not been reinstated. However, this is a case in which the applicant has diligently set out to mitigate her loss.

[68] The respondent is to pay Ms Sefo four months loss of earnings less the money earned in the period 6 July 2006 until 6 November 2006. At the request of counsel, I leave that calculation to the parties. Leave is reserved in the event agreement is not possible.

[69] Evidence before the Authority makes it clear that the applicant suffered very considerable humiliation and injury to feelings as a result of her grievance. Her own evidence and that of her partner, Mr Gus Cuthbertson, is detailed and clear. It is also unchallenged. Having considered the submissions of counsel, and also the applicant's long service with the respondent, I award the applicant the sum of \$15,000 compensation.

[70] As indicated above, I have found that the applicant contributed to her dismissal and I set her contribution at 20%.

Summary of orders

[71] The respondent is to:

- Pay the applicant four months' lost gross remuneration less monies earned between 6 July and 6 November 2006. From this, 20% is to be deducted.
- Pay the applicant the sum of \$12,000 without further deduction pursuant to s.123(1)(c)(i) of the Act.

Costs

[72] Costs are reserved. The parties are to attempt to resolve this issue between themselves. If that cannot be achieved, Mr Cranney is to lodge and serve his memorandum. Mr Scott-Howman is to lodge and serve his reply 14 days after receipt of the applicant's memorandum.

Paul Montgomery
Member of the Employment Relations Authority