

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Pauline Warren (Applicant)  
**AND** United Fisheries Limited (Respondent)  
**REPRESENTATIVES** Robert Thompson, Advocate for Applicant  
Penny Shaw, Counsel for Respondent  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 6 April 2005  
**DATE OF DETERMINATION** 24 May 2005

DETERMINATION OF THE AUTHORITY

*The employment relationship problem*

[1] The applicant, Pauline Warren was employed as a grade 2 cleaner with United Fisheries Limited (“United Fisheries”) from 18 March 2002. Her work was covered at the relevant time by the United Fisheries collective employment agreement 1 October 2003 - 30 September 2004.

[2] On 10 December 2003 Ms Warren was summarily dismissed from her employment for refusing to follow manager Ross Jolly’s instruction to clean the large factory staff cafeteria. She says that her dismissal was unjustified. United Fisheries say that they were justified in terminating Ms Warren’s employment.

[3] Ms Warren said that the main reason she refused to do the cleaning of the staff cafeteria was because of discomfort from an elbow injury which she told Mr Jolly about when he asked her to clean the staff cafeteria on 10 December 2003.

[4] Ms Warren had cleaned the large cafeteria the previous week and again on 8 December 2003 when she had been required to cover for a cleaner who had taken time off as the result of the death of a friend. Ms Warren and that cleaner had by all accounts a fairly heated discussion on 9 December 2003 and then the other cleaner undertook pre-planned training on 10 December 2003.

[5] Mr Jolly says that Ms Warren never mentioned her elbow discomfort to him when he asked her to clean the cafeteria on 10 December 2003. It was agreed that Ms Warren said to Mr Jolly on 10 December that she would not do the job of a grade 1 cleaner as she was a grade 2 cleaner. Mr Jolly said that Ms Warren said *I wouldn’t do that cow’s work for anything* but Ms Warren did not accept that. Mr Jolly made the request of Ms Warren again to clean the cafeteria and advised Ms Warren to the effect that it was an instruction or an order. Ms Warren refused again and Mr Jolly then made it clear that Ms Warren should do the cleaning or face dismissal. There is no

dispute that after Ms Warren again refused to clean the cafeteria Mr Jolly dismissed her. There is a dispute as to exactly what was said but I do not find that much turns on that.

[6] Mr Jolly then telephoned the general manager Andre Kotzikas and told him what had happened. Mr Kotzikas asked Mr Jolly to make sure Ms Warren stayed on the premises and that he would meet her when he arrived at work. Mr Jolly then approached Ms Warren accompanied by the production manager Emile and asked Ms Warren again to reconsider her position. Ms Warren said that *she could not see the point as Ross has already sacked me.*

[7] The union delegate Martin Clarke went to see Ms Warren and asked her to write down the events that had led to her dismissal. Ms Warren wrote down some notes. Mr Kotzikas also asked Mr Jolly to prepare some notes which he did.

[8] After about an hour Ms Warren was asked to go and see Mr Kotzikas in his office. Mr Clarke went with her. Mr Kotzikas opened the meeting on the basis that he intended the meeting to sort the issues out. I am satisfied that the meeting was to revisit the events that gave rise to the dismissal. Mr Clarke said that he thought if Ms Warren came up with a good reason then her employment would have continued.

[9] Mr Kotzikas asked Ms Warren why she had refused to do the work. Ms Warren advised Mr Kotzikas that she refused to do the work as she was not doing a grade 1 cleaners job. Mr Kotzikas told Ms Warren that as far as he was concerned cleaning the cafeteria was the same as any other area. Mr Kotzikas then specifically instructed Ms Warren to perform the cleaning and she refused. I consider it likely there was some mention of the refusal being serious misconduct. Mr Kotzikas then reconfirmed that Ms Warren was dismissed.

### ***The issues***

[10] The issues for determination are:

- i. Was the instruction to Ms Warren to clean the staff cafeteria lawful and reasonable?
- ii. Was the refusal to obey the instruction in this case wilful disobedience?
- iii. Was the procedure adopted to investigate the refusal fair?
- iv. Was it was open to a fair and reasonable employer to see the disobedience as justifying dismissal?
- v. If Ms Warren was unjustifiably dismissed whether there should be any adjustment to remedies.

### ***Was the instruction to Ms Warren to clean the staff cafeteria lawful and reasonable?***

[11] There is a need to resolve the dispute about whether Ms Warren mentioned to Mr Jolly that she was suffering discomfort with her elbow. There is no dispute that Ms Warren had experienced difficulties with an elbow injury since 1998 and had seen the industrial nurse at United Fisheries about her elbow after she was employed there.

[12] I conclude on the balance of probabilities that Ms Warren did not mention any elbow discomfort to Mr Jolly to 10 December 2003 for the following reasons:

- Ms Warren was instructed by Mr Clarke to make notes of the exchange with Mr Jolly shortly after her dismissal on 10 December before meeting with Mr Kotzikas. Ms Warren's own notes do not refer to any elbow discomfort but state that she refused to do the cleaning because it was not the area she was employed to clean.

- Ms Warren made no mention of her elbow discomfort to Mr Clarke that he could recall.
- Ms Warren did not mention any elbow discomfort to Mr Kotzikas when she met with him later on the morning of 10 December 2003.
- Ms Warren said that Mr Jolly was very angry when he came to ask her to clean the large cafeteria and just ignored her when she complained about her elbow discomfort. I have some difficulty reconciling this with the fact that Mr Jolly asked about Ms Warren's birthday before asking her to do the dishes and cleaning at the large cafeteria.

[13] I am not satisfied that Ms Warren told Mr Jolly or Mr Kotzikas that discomfort with her elbow was the reason she was refusing to perform the duty.

[14] I have also considered the matters put forward by Ms Warren that she was a grade 2 cleaner and would not perform grade 1 work. The grading was concerned not with tasks but with ability to work unsupervised and competently. Ms Warren did have her designated areas to clean along with two other cleaners. In the event of another cleaners absence then it was necessary for the other cleaners to cover all the work but not as thoroughly. Ms Warren had undertaken this cover on other occasions without complaint.

[15] I am satisfied that the instruction by Mr Jolly to Ms Warren to clean the large cafeteria was a reasonable and lawful one.

***Was the refusal to obey the instruction wilful disobedience?***

[16] Ms Warren did not accidentally or unintentionally refuse to clean the large cafeteria and her evidence is that the main reason for refusal had nothing to do with a dispute about the different grades in the agreement but was because of her elbow. I conclude that Ms Warren's refusal to obey the instruction was deliberate and wilful.

***Was the procedure fair?***

[17] Mr Jolly should have asked Ms Warren to attend a meeting with him or the general manager to discuss the allegation that she had failed to follow a lawful and reasonable instruction. That would have enabled a brief cooling down period. Ms Warren should have been advised to bring a representative to the meeting and have been warned before the meeting that she could face dismissal in accordance with the process set out in schedule two of the collective agreement. There was some procedural unfairness during the first meeting.

[18] There was then a meeting with Mr Kotzikas at which Ms Warren was represented. I consider that this meeting was a genuine attempt by Mr Kotzikas to reconsider the events leading to the dismissal. The meeting took place after a short cooling off period when Ms Warren had had an opportunity to write notes and consider the matter herself. She knew that the matter was serious. She had an opportunity with Mr Kotzikas to offer a further explanation or perform the duty. She did not add to the explanation that she gave Mr Jolly about it being the work of a grade 1 cleaner. She made no mention of elbow discomfort. Although that meeting was short there were no new matters advanced by Ms Warren for the employer to investigate and the dismissal was confirmed.

[19] Considering the matter overall I am satisfied that Ms Warren was treated fairly and that she had a real opportunity to explain her refusal to obey an instruction of Mr Jolly. Had Ms Warren provided a suitable explanation as to why she refused to clean the cafeteria to Mr Kotzikas or indeed agreed to clean the cafeteria she would have been able, I am satisfied, to continue with her employment and that would have been the end of the matter. There was nothing to support that

there was an ulterior motive in dismissing Ms Warren and the evidence was that she was a good worker.

***Was it open to a fair and reasonable employer to see the disobedience as justifying dismissal?***

[20] An open and deliberate refusal to obey a lawful and reasonable instruction can justify a dismissal. The instruction to Ms Warren was lawful and reasonable and her refusal was deliberate. Ms Warren had previously performed the cleaning task to cover for other cleaners without complaint and there was no real dispute about whether she could be asked to perform the duty. The evidence does support that Ms Warren felt aggrieved by the exchange with the other cleaner the previous day and she did think that she should be classified as a grade 1 cleaner. In an employment relationship where there are obligations of good faith, trust and confidence those matters should have been addressed by Ms Warren in a different way rather than simply refusing to undertake duties.

[21] In *NZ Shipwrights etc Union v Honda New Zealand Ltd* [1989] 3 NZILR 794 it was stated:

*The work to be carried out within the ambit of lawful and reasonable direction is the work which the employer requires to have done and not merely the work which the employee is prepared to do. Wages are the reward for doing the employer's work and not for doing what the employee sees fit to do.*

[22] Discomfort to Ms Warren's elbow would have been a justifiable reason for her to refuse to undertake the duty. Ms Warren did not, I have found on the balance of probabilities, make reference to any elbow discomfort either to Mr Jolly or to Mr Kotzikas. There is no basis for Ms Warren to say that Mr Jolly and Mr Kotzikas should have known about her elbow being the reason for the refusal to obey the instruction.

[23] I conclude that it was open to a fair and reasonable employer to have seen Ms Warren's refusal to comply with the instruction to clean the large cafeteria as justifying dismissal.

[24] Ms Warren does not have a personal grievance.

***Costs***

[25] I reserve the issue of costs.

Helen Doyle  
Member of Employment Relations Authority